Director of Employment Standards

Reasons for the Determination

ER # 122 316

Retirement Concepts Seniors Services Ltd.(a federal corporation)
Retirement Concepts Holdings Ltd. (a federal corporation)
Nanaimo Seniors Village Partnership (a partnership)
And
Well-Being Seniors Services Ltd. (a federal corporation),
entities associated under Section 95 of the Employment Standards Act.

- and –

Employees of the Associated entities at Nanaimo Seniors Village

Delegate: Ian MacNeill
Delegate of the Director of Employment Standards

Date of Decision: July 24, 2006.

I. INTRODUCTION

The Director of Employment Standards has received complaints from 96 employees and former employees of Nanaimo Seniors Village (the Complainants) filed under section 74 of the *Employment Standards Act* (the Act) alleging that Nanaimo Seniors Village Partnership and Well-Being Seniors Services Ltd., (jointly the Employer) contravened the Act by failing to pay group termination pay. At issue is a claim filed through the law offices of McGrady Baugh & White, alleging that 123 care staff employees at the Nanaimo Seniors Village were terminated on either January 4, 2004, July 14, 2004 and on September 9, 2004, without notice or termination pay. The Complainants request compensation for length of service and group termination compensation for all three terminations.

An investigation was conducted and these reasons for my determination are being provided as required by section 81 of the Act.

II. BACKGROUND

Nanaimo Seniors Village is a multi-care facility in the City of Nanaimo. A business operating in this industry falls within the jurisdiction of the Act. These 96 complainants were employed as care aides, activity aides and licensed practical nurses for various lengths of time from April 2001 to September 9, 2004. Their rates of pay varied from $16.00 to $22.00 per hour. The complaints were filed in the time period allowed under the Act.

The Employer and their legal counsel were provided with the letters of complaint from the legal counsel representing these complainants. Both have responded to the allegations through numerous submissions. After reviewing these initial submissions and speaking with various parties related to the dispute, I issued a letter setting out my preliminary findings and made a recommendation for settlement of the complaints. Both parties responded to my preliminary findings with further submissions.
Mr. McDonald, counsel for the Employer, has suggested that the Employment Standards Branch has failed to provide the Employer with a clear indication of the particulars to which they were to respond and therefore has not complied with the provisions of section 77 of the Act. In addition, Mr. McDonald has requested an oral hearing prior to my determination being issued. The details of this complaint are set out in the September 24, 2004 letter to the Employment Standards Branch from Mr. James Baugh. The Administration and the Human Resources Manager for Nanaimo Seniors Village were provided with a copy of this letter of complaint. Mr. McDonald received a copy of Mr. Baugh's letter and has responded to it on behalf of the Employer.

Section 77 of the Act requires that if an investigation is conducted, the Director must give the person under investigation an opportunity to respond to the complaint that has been made against them.

I have provided the Employer with the letters of complaint and given them an opportunity to respond. I have received submissions from both parties and issued a preliminary finding. The parties have had an opportunity to consider the preliminary finding, respond to it and make additional arguments. Both filed numerous submissions and I have considered all of those submissions in arriving at my determination. Under these circumstances, I do not feel it is necessary to hold an oral hearing prior to issuing my determination. In addition, I believe the process set out above clearly establishes the Director has met the obligations of section 77.

III. ISSUES IN DISPUTE

Was the care staff employed at Nanaimo Seniors Village terminated on January 4 or July 14, 2004?

If they were terminated, did they receive notice of termination or pay in lieu of notice pursuant to section 63 of the Act?

If they were terminated, did they receive group termination notice or pay in lieu of notice pursuant to section 64 of the Act?

Do the provisions of section 95 of the Act relate to these termination dates?

Was there a disposal pursuant to section 97 of the Act associated with either January 4, 2004 or July 14, 2004?

Was the care staff employed at Nanaimo Seniors Village terminated September 9, 2004?

If they were terminated, did they receive individual notice of termination or pay in lieu of notice pursuant to section 63?

If they were terminated, did they receive group termination notice or pay in lieu of notice pursuant to section 64 of the Act?

Was there a disposal pursuant to section 97 of the Act associated with the September 9, 2004 termination date?

IV. EVIDENCE AND FINDINGS

In my investigation of this complaint, I found there were numerous companies involved in the operation of Nanaimo Seniors Village. It is appropriate to review the corporate structures of these companies and their various relationships as my findings with

respect to sections 95 and 97 of the Act evolve from some of the information found in these corporate structures.

It was noted by Mr. Baugh, Nanaimo Seniors Village is a care facility opened in April 2001. At that time and up to December 31, 2003, it was operated by Nanaimo Seniors Village Ventures Ltd. The B.C Corporate Registry indicates this company was incorporated in B. C. on April 17, 2000 and transferred or continued out to federal registration on December 23, 2003. The Directors of Nanaimo Seniors Village Ventures Ltd. at the time are Zahur Moosa and Shamim Abdul Jamal. During this time period, Ms. Mary McDougall was employed as the CEO of Nanaimo Seniors Village Ventures Ltd. and Ms. Sue Ball was employed as the Administrator of the facility.

Retirement Concepts Holdings Ltd. was originally incorporated in B.C. in December 2001. This company was then transferred or continued out on December 23, 2003 as 4212932 Canada Inc., a federally registered company. Retirement Concepts Holdings Ltd. was then re- incorporated on December 24, 2003 under Federal registration. It was again registered as an extraprovincial company in B.C. on June 7, 2004. This Company has 3 Directors, Mr. Zahur Moosa, Mr. Abdul K.V. Jamal and Mr. Azim Jamal. 4212932 Canada Inc. has two Directors, Abdul K.V Jamal and Shamim Abdul Jamal.

As of January 1, 2004 Nanaimo Seniors Village Ventures Ltd. and Retirement Concepts Holdings Ltd. joined together to form the Nanaimo Seniors Village Partnership (the Partnership). In doing so, they became operator of the facility and the new employer of the employees at Nanaimo Seniors Village. There is no evidence that the employees were given notice of this change and no indication that any of the employees were terminated.

On December 30, 2003, the Partnership entered into a Contract Service Providers Agreement with a company named Well-Being Seniors Services Ltd. (Well-Being). This was an agreement to take over the employment of the care staff at the Nanaimo Seniors Village and the contract was to run until January 2009. As will been acknowledged, it was intended that initially, the Care Aides (CA) and Activity Aide (AA) would be employed by Well-Being and later in the year the Registered Nurses (RN) and the Licensed Practical Nurses (LPN) would become employees of Well-Being. As noted above, no employees were given notice of this change and no employees were terminated

My searches through the Industry Canada Registries find that Well-Being Seniors Services Ltd. is a federally registered company incorporated on April 1, 2004 as a result of the transfer or continuance of Well-Being Assisted Living Services Ltd. This was a provincially registered company, incorporated on May 12, 2000. B.C. Corporate Registry reflects that Well-Being Seniors Services Ltd. was later registered as an extraprovincial company on February 1, 2005. The Federal registration for Well-Being Seniors Services Ltd. lists Mr. Shamim Abdul Jamal as the Director. Well-Being Assisted Living Services Ltd. also lists Mr. Shamim Abdul Jamal as a Director.

It is important to note here that the corporate records indicate that Well-Being Seniors Services Ltd. did not come into existence until April 1, 2004 even though it has been mentioned in the submissions of both parties as playing a role in the service agreement and the employment agreements January 2004. It should also be noted that the spelling of the corporate name is not hyphenated as it is in the corporate registry. Its predecessor, Well-Being Assisted Living Service Ltd. was in existence in January 2004.

On April 1, 2004, Nanaimo Seniors Village Ventures Ltd. and 4212932 Canada Inc. were amalgamated along with a number of other companies to form Retirement Concepts Seniors Services Ltd. This company was originally incorporated under provincial registration February 1998, but was continued out and incorporated under federal registration on April 1, 2004. It was then re- registered in B.C. as an extraprovincial company on June 8, 2004. This federally registered company has the same directors as Retirement Concepts Holdings Ltd. and common Directors with 4212932 Canada Inc. With this amalgamation, Retirement Concepts Seniors Services Ltd. became the new partner, along with Retirement Concepts Holdings Ltd., in the Nanaimo Seniors Village Partnership. Ms. McDougal and Ms. Ball continued on their CEO and Administrative capacities as employees of the Partnership.

Copies of the Federal and Provincial search documents are included as attachment **A.**

At a June 30, 2004 Labour Relations Board Hearing (LRB) into an application for Certification by the Hospital Employees' Union, Counsel advised that the Union had named the wrong employer in their application and alleged that the correct name of the employer is Well-Being Seniors Services Ltd., a company who had been the employer of the care staff since January 2004. This information came as a surprise to the Union.

In the course of this investigation, the parties have made reference in their submissions, to various LRB Decisions and the submissions made to the LRB on the complaints before them. The issues before the LRB have some similarities to those addressed in this determination. I have reviewed BCLRB *No.* B221, B271 & 305/2005 and noted some of the information from those decisions that relate to the issues surrounding these complaints.

In his September 24, 2004 submission Mr. Baugh refers to a July 14, 2004 memo sent to all the employees of Nanaimo Seniors Village advising that Well-Being had been providing the care services to Nanaimo Seniors Village for the past 6 months, and further advising that the care service provider was again going to be changing. This memo was sent by the CEO, Mary McDougall. Mr. Baugh contends that this was the first the employees had heard of the name Well-Being. If they had been terminated by Nanaimo Seniors Village Ventures Ltd. they were not informed of this and felt they were entitled to individual and group termination compensation pursuant to sections 63 and 64 of the Act.

Alternatively, the Complainants say that if they were not terminated, then Nanaimo Seniors Village Partnership (the Partnership) and Well-Being should be associated under section 95 of the Act and both should be liable for termination compensation when on September 9, 2004, CareSource Solutions Inc. was awarded a contract to take over the care services at Nanaimo Seniors Village and these employees were terminated by Well-Being.

Ms. Sue Ball is the Administrator at Nanaimo Seniors Village and one of the first people from Nanaimo Seniors Village that I spoke to regarding these complaints. She confirmed that the Care Aides and Activity Aides (CA/AA) were represented by the BCGSEU up until November of 2003. At that time, they applied for and were granted decertification. The Employees and Management then set up a committee to negotiate new terms and conditions of employment for those staff members. Ms. Ball was a member of that committee along with CEO Mary McDougall and the Human Resources Manger for the Partnership, Ms. Carol Crow. The Employee representatives on the committee were Howard Van Impe, Patricia Lewis and Mike Jacobsen.

Committee representative Howard Van Impe claims the Employees were told by the management that if they could negotiate a new agreement, the employer would not contract out their jobs. The Employees believed they were engaged in meaningful negotiations but contend the employer declined all of the proposals they put forward and finally told them they had to reduce wage and/or benefit costs by $10.00 per hour. The management's approach to negotiations upset them but in the end, they voted for a $5.00 reduction in wages and a $5.00 reduction in benefits. That agreement saw their wages reduced to $17.00 per hour, the number of statutory holidays reduced from 12 to 9 days and annual vacation pay reduced from 8% to 6%. Mr. Van Impe and the other members of the Committee were under the impression they were negotiating with Nanaimo Seniors Village Ventures Ltd. and contend that the name Well-Being was never mentioned to them at any time during their negotiation. During this same period of time, the Employees and management put together an Employee Hand-book that set out their new terms and conditions of employment.

Mr. Van Impe advised that in January 2004, the Administration presented the CA/AA group with Employment Agreements to sign. These were 2 page documents with the name Well-Being Seniors Services Ltd. (Nanaimo) printed at the top with a logo resembling a tree. These were presented while the staff were working or signing in for their shifts. They were told that the agreement was for the change in their payroll. Mr. Van Impe recalled that the agreement was presented to him as he signed in one day and he had no time to read it. He was told by some of the others in his group that they also were approached to sign their agreements while signing in for work or while they were caring for patients. He does not recall any of his employee group questioning him about these agreements. Ms. Lewis, a member of the employee committee recalled the name Well-Being appeared on her pay cheques late February or early March of 2004. She pointed out that the logo used by Well-Being is identical to that used by Nanaimo Seniors Village Ventures Ltd. and that is one of the reasons nobody noticed. Copies of these agreements are included as Attachment **B.**

Shirley McLennan advised that the Registered Nurses (RN) and Licensed Practical Nurses (LPN) also set up a committee to negotiate with management. Neither employment group had been covered by a collective agreement previously but they had signed an agreement with Retirement Concepts, Nanaimo Seniors Village. That agreement expired on March 31, 2004. This is the previously mentioned Retirement Concepts Holdings Ltd. first registered under provincial jurisdiction. Mrs. McLennan represented the RN group and they were successful in negotiating a satisfactory agreement. Although they thought they were negotiating to sign a new agreement with Retirement Concepts, they were told in early May that Well-Being would be their new employer. The RN agreement with Well-Being was signed May 20, 2004.

Ms. Tanya Lestrange and Mr. Mark Brennan represented the LPN group and advised they did not sign a new agreement with the management. There were proposals exchanged and rejected by both sides. In the end, they were given a number to work with and were told, this is what you are getting. Like the RN group, the LPN group also thought they were negotiating with Retirement Concepts but were told by Carol Crow that Well-Being had taken over the employment of the care staff and was to be their new employer.

Ms. Crow acknowledges the creation of Well-Being saying that the Partnership wanted to separate the care services from the facility as they thought there were some savings to be made. She likened it to the contracting out of care services. Ms. Crow acknowledged the employees established a committee to negotiate with the Employer, signed agreements and put together new conditions of employment. However, Ms. Crow contends that the CA/AA group were aware their employer was going to change and the change was reflected in the agreements they signed. Ms. Crow concedes there were no Records of Employment (ROE) issued and in hind-sight was probably something they should have done. This separation took place for the CA/AA group on January 4, 2004, the start of the first pay period in 2004. Well-Being became the employer of the RN group on May 20, 2004, the date their agreement was signed or implemented. Well-Being also took over responsibility for the LPN's payroll on that date even though there was no agreement signed between them.

Ms. Ball advised that Well-Being was created by the Partnership to employ the care staff at Nanaimo Seniors Village. Her recollection of some of the circumstances surrounding Well-Being is somewhat different to that of Carol Crow. Although she was part of the Management team that negotiated with the CA/AA group she does not believe this group was told that Well-Being was to be their new employer. Both Ms. Ball and Ms. Crow acknowledge that all employees from the CA/AA group continued to work through this January 4, 2004 period of time and the Administration had no reason to believe they would not do so. None of the employees lost any shifts and no schedules or rotations changed. Ms. Ball had no recollection of any of the CA/AA staff approaching her prior to July 2004 about the existence of Well-Being and that name being reflected on the pay cheques.

Mr. McDonald responded to the Complainant's allegations on behalf of Nanaimo Seniors Village Partnership (the Partnership) and Well-Being Seniors Services Ltd. (Well-Being) He acknowledges Well-Being is a company that comes under the

Retirement Concepts umbrella. Mr. McDonald advises the Partnership and Well-Being entered into a 'contract service provider's agreement for Well-Being to take over the care services at Nanaimo Seniors Village. This agreement was entered into December 30, 2003 and was to run from January 4, 2004 to January 9, 2009 and was to be a two-stage process. The CA/AA group was to be hired by Well-Being immediately and given individual contracts of employment. Because of a delay setting up payroll, they did not begin receiving pay cheques from Well-Being until March 2004. During the intervening time, they were paid by the Partnership. A copy of the Contract Service Provider's Agreement is included as Attachment **C**.

As I noted in my review of the corporate structures of the various companies involved, Well-Being Seniors Services Ltd, the company named on the Service Providers Agreement was not incorporated until April 1, 2004 and legally did not exist on December 30, 2003. This does not mean the contract is void. The Partnership may have envisioned or planned that Well-Being would eventually employ the care staff and put the 'Well Being' company name on the Service Providers Agreement. Similarly, the 'Well Being' name that appears on the employment agreements could have been planned as the future employer of the employees. Section 14 of the Canada Business Corporations Act (R.S.1985, Cc.44) contains a provision that allows a company to adopt contracts that came into effect within a reasonable time prior to their incorporation or existance. This would allow Well-Being, incorporated April 1, 2004, to adopt the Contract Service Providers Agreement and the Employment Agreements signed with the CA/AA group as their own.

The RN/LPN group became employees of Well-Being as of May 20, 2004 and received pay cheques from Well-Being as of the next pay period. They were also covered by the previously mentioned handbook which set their terms and conditions of employment.

Mr. McDonald contends that the actions that took place in January 2004; when the employment of the care teams was transferred from the Partnership to Well-Being did not constitute termination for the purposes of the Employment Standards Act. He points out that in the Complainants' September 24, 2004 submission it refers to the Partnership and Well-Being as associated companies pursuant to section 95 of the Act. Mr. McDonald agrees there are many elements to their relationship that would support this conclusion. He cites the original Mitchell decision (BC EST # D 107/98) in support of this position and acknowledges that this would be an acceptable way to view the circumstances surrounding the events of January, 2004. If that is how this situation is to be viewed, with Well-Being and the Partnership treated as one employer, then he suggests, there has been no termination and no compensation is owed.

In response, Mr. Baugh points out that the suggestion that these firms were associated was an alternative argument to the Complainants' original contention that they were terminated and owed compensation. He then points out that the respondents made a different argument in submissions on a similar case at the LRB. In that situation he contends Mr. McDonald argued on behalf of Well-Being and claimed that his client was the true employer at Nanaimo Seniors Village and that the Partnership had no employees after April, 2004.

Should it be found that these companies are not associated; Mr. McDonald argues that the transfer of care services to Well-Being constituted a disposition of all or part of a business and that triggers the provisions of section 97. This section deems the employment of the employees to be continuous and uninterrupted and requires no payment of termination compensation.

Section 97 of the Act says;

If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

Previous decisions of the Employment Standards Tribunal have set two pre-conditions to be met in order for section 97 to apply. There has to be a disposal of a business and the employees of the vendor have to be employed by the purchaser. If both happen, the Employees are not terminated and their employment for the purposes of the Act is deemed continuous. As noted earlier, Mr. McDonald argues that the disposition here is the same as in the Mitchell decision where the Tribunal said "section 97 is broad enough to include any disposition that results in a change in the legal identity of the employer".

Administrator Sue Ball and the employee representatives acknowledge that all care staff remained employed, shift rotations were not changed and all seniority was recognised through their change to Well-Being.

The Complainants have argued strenuously that section 97 does not apply as there has been no disposition of a business as was present in the Mitchell decision. They are adamant that this is a 'contracting out' of services and 'contracting out' does not equate to disposition. They base their argument on a decision from the LRB regarding the Canadian Cancer Society that says there cannot be any successor-ship or continuity of employment arising from a 'contracting out' of services.

Mr. McDonald notes that the Mitchell decision dealt with the contracting out argument and the relationship between section 35 of the code and section 97 of the Act. In Mitchell, the Tribunal says that the language of 97 is not the same as that of section 35 in the Labour Relations Code and the LRB decision should not be applied in an Employment Standards environment as the statutes have distinctly different intent. With that issued already addressed in Mitchell, I see no point in reviewing it here.

Mary McDougall's evidence in LRB decision B221/2005 indicates that the real reason for the Partnership's interest in finding a service provider was to get away for the health care sector's Master Agreement. It was thought that could be achieved by creating a company to take over the employment of the care staff and distance them from the Partnership. This is where Well-Being came in. It was created by the Partnership and is 100% owned by Retirement Concepts Seniors Services Ltd. This same company also owns 99.99% of the shares in the Partnership.

I find, from reviewing the events surrounding January 4, 2004, there has been no disposition as anticipated by section 97 of the Act. What we see here is a corporate reorganization. In fact there have been two reorganizations. The first created the original Partnership and the second sees the creation of a subsidiary company by the Partnership. The creation of Well-Being was an attempt to create an arms length relationship to avoid the Health Sector Master Agreement. As I have noted, Well-Being is owned by Retirement Concepts Seniors Services Ltd. which in turn owns 99.99% of the shares in the Partnership. The employees were not given notice of this change as there was no intention to terminate them and none appear to have missed a shift. The Partnership continued to pay the employees for 3-4 months after this agreement was made even though they were supposed to be employees of Well-Being. Mary McDougall and Sue Ball, employees of the Partnership, continued operating in their respective capacities as Administers as Well-Being did not have any management staff at the Nanaimo Seniors Village.

When the RN/LPN group were negotiating with the Employer, they were told in May their new employer was to be Well-Being. They were told verbally, they received no notice and no ROE and it was expected that they would continue to work at the facility after the contracts were signed. By this time, Well-Being Seniors Services Ltd. had been continued from its predecessor and incorporated under Federal jurisdiction. In addition, the form of the Partnership had also changed with the amalgamation of Nanaimo Seniors Village Ventures Ltd. into Retirement Concepts Seniors Services Ltd. and the latter company forming the new partner in the Partnership.

The Employer and to a lesser extent the Complainants suggest that Well-Being and the Partnership could be viewed as associated corporations pursuant to section 95 of the Act.

Section 95 says;

If the Director considers that businesses*, trades or undertakings are carried on by or through one corporation, individual, firm, syndicate or association, or any combination of them under common control,*

> *(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, a settlement agreement or an order of the Tribunal, and this Act applies to the recovery of that amount from any or all of them.*

The Employer has referred to Well-Being as a company that falls under the Retirement Concepts umbrella. In light of this corporate structure and the history of that structure, I would suggest that Nanaimo Seniors Village Ventures Ltd., under the direction and control of Mr. Shamim Abdul Jamal would also fall under that umbrella.

The Nanaimo Seniors Village care facility is owned by the Partnership. That Partnership, through evolution is made up of the two Retirement Concept Companies. The staff that operate the facility and look after the patients, were employed by Nanaimo Seniors Village Ventures Ltd. prior to December 30, 2003 and then by the Partnership and Well-Being after January 4, 2004 and up to September 9, 2004. Well-Being and Nanaimo Seniors Village Ventures Ltd. have had a common President and Director.

Clearly, the Partnership has the financial investment in the physical assets while Well-Being employs the staff who cares for the patients in the facility. The care staff is an integral part of the operation as the facility could not operate without them. Unlike other physical assets, they cannot as a group, be replaced overnight. In order for the facility to operate, these two entities must operate side by side. CEO Mary McDougall and Administrator Sue Ball worked for Nanaimo Seniors Village Ventures Ltd. and continued to work at the facility for the Partnership after January 4, 2004

I believe all the conditions are present here and Nanaimo Seniors Village Partnership and Well-Being Seniors Services Ltd. should be associated under section 95 of the Act. Well-Being lists as a Director, Shamim Abdul Jamal. He was also an Officer of Nanaimo Seniors Village Ventures Ltd. and 4212932 Canada Inc. companies that were amalgamated into Retirement Concepts Seniors Services Ltd. He is related to Abdul K.V. Jamal, who is a Director of Retirement Concepts Holdings Ltd., Retirement Concepts Seniors Services Ltd. and 4212932 Canada Inc. Mr. Zahur Moosa is also a Director of Nanaimo Seniors Village Ventures Ltd. and a Director of the two companies that make up the Partnership as it operated at this time. The Partnership created Well-Being to employ the care staff and to create an arms length relationship between it and the Health Sector Master Agreement. Well-Being is owned 100% by Retirement Concepts Seniors Services Ltd., which in turn owns 99% of the shares in the Partnership. Clearly, Well-Being and the Partnership are under common direction and control. See Attachment **A**.

Associating these two businesses under section 95 will meet the needs of the Employment Standards Branch to ensure the employee's rights are protected, ensure the intent of the Act is up held and is in agreement with the positions expressed by both parties.

I find Nanaimo Seniors Village Partnership and the companies that form it, together with Well-Being Seniors Services Ltd. to be associated as one employer pursuant to section 95 of the Act as the employers of the care staff at Nanaimo Seniors Village effective December 30, 2003. This association of businesses applies to the January 4 and July 14, 2004 dates referred to in Mr. Baugh's letter of complaint and to the new relationship formed or negotiated with the RN/LPN groups of employees. With the association of these two companies there is no termination of employment and no notice or payment in lieu of notice owed to these employees pursuant to sections 63 or 64.

On July 14, 2004, the care staff at Nanaimo Senior Village received the previously mentioned notice from CEO Mary McDougall advising that a change in the contract

care provider was coming and that Well-Being was to be replaced. A copy of the notice is included as Attachment **D**.

From the LRB decision # B 221/05, the Partnership, through the testimony of Mary McDougall expressed the concern that because of the close association of Well-Being to the Partnership, Well-Being may not be seen as an independent entity. To meet its business objectives of avoiding the Health Sector Master Agreement and maintaining the cost savings realized by contracting to Well-Being, they may need to contract with a third party to establish an arms length relationship with a contractor outside of the Retirement Concepts Group. With this in mind they entered into discussions with Bayshore Health Care to negotiate a new contract service providers' agreement and on July 14, 2004, the care staff received the previously mentioned notice from CEO Mary McDougall advising that Well-Being was to be replaced. A copy of the notice in included as Attachment **D**.

Ms. Ball advised that the July 14, 2004 notice was followed by a meeting on July 28, 2004 where she, HR Manager Carol Crow and CEO Mary McDougall were present. The staff was told that a new care service provider was coming in. The employees responded with questions about wage rates, benefits, lay offs and conditions of employment. Ms. Crow advised them that they hoped all those issues would remain the same, but that it would be up to the new contractor. This meeting was followed on August 4 by a letter from CEO Mary McDougall, advising that Bayshore Health Care was to take over as the new service provider. For reasons that I am not aware of Bayshore Healthcare backed out of this arrangement and CareSource Solutions Inc. (CareSource) stepped in. The letter advises the employees that their employment with Well-Being would end at 7:00 AM on September 9, 2004. A copy of the August 4, 2004 letter is included as Attachment **E**.

It is my understanding from speaking with the management and employee representatives that copies of the August 4, 2004 letter were hand delivered to each employee if they were at work that day or enclosed with their August 11, 2004 pay cheque if they were not at work. The letter indicates that the continuity of care is important and a priority to Nanaimo Seniors Village and advised the new service provider would contact them to discuss employment terms. This letter was followed by an August 5, memo signed by Administrator Sue Ball and posted for the employees to read. The relevant part of this memo is contained in the first paragraph and said;

"Your letters are not layoff notices. Nothing has changed from what Mary (McDougall) told you last week. Well-Being (as of September 9) will no longer be the service provider at Nanaimo Seniors Village. That is all the letters are. No one has been laid off." A copy of this letter is included as Attachment **F**.

The following day, August 6, 2004, another notice was posted for the employees. The last paragraph reverses the August 5 memo and confirms the August 4, 2004 letters were to be considered as notices of termination from Well-Being. It also says that "we, the Administration, are doing everything we can to ensure continuity of care at Nanaimo Seniors Village" but cannot make any assurances as it is up to the new contractor. A copy of this letter is included as Attachment **G**.

Ms. Crow has confirmed that the August 4, 2004 letter was intended to give the employees 4 weeks written notice of termination from Well-Being so their employment would end at a specific time, 7:00 AM September 9, 2004 and the employees commence their next shift with CareSource. Ms. Crow confirmed there were no employees whose work shift spanned the 7:00 AM time period. The employees who worked September 8 night shift, ended at 7:00 AM September 9, 2004 and their employment with Well-Being was terminated at the completion of this shift. The employees starting work at 7:00 AM September 9 last worked a shift on September 8 or had been on days off prior to commencing work on September 9 for a new employer.

Ms. Crow acknowledged being aware of the provisions of section 64 of the Act and the requirement for group termination notice. However, no notice under section 64 was given as the Administration believed they had less than 50 full time or part time employees and that the balance were on-call employees excluded under section 65 1(a) of the Act.

Mr. Mc Donald is adamant that these employees were not terminated prior to 7:00 am, September 9, 2004. He contends that the termination of employment by Well-Being took place after the disposition of the business as Well-Being's contract with the Nanaimo Seniors Village Partnership expired at 6:30 am on September 9, 2004. A copy of the letter terminating the contract is included as Attachment **H**. The employees were kept on past the termination of the Well-Being contract and continued to be employed until 7:00 am. He notes that when the CareSource contract took effect as of 7:00 am, September 9 all the staff were still Well-Being employees despite the fact that the Well-Being contract had expired at 6:30 am that day. In addition, Mr. McDonald contends those Well-Being employees became employed by CareSource Solutions as of September 9, 2004 and he has included a copy of a sample employment agreement. Mr. McDonald contends that as there is no specified start time on the employment agreement, under ordinary rules of interpretation this would mean 12:00 am on September 9, 2004. So, for a period of 7 hours from midnight to 7:00 am these employees were employed by both Well-Being and CareSource and at the moment of time when the CareSource contract commenced, these employees were still employed by Well-Being. A copy of the CareSource employment agreement is included as Attachment **I**.

In response to this submission, Mr. Baugh suggests that the employer's contention that Well-Being continued to employ the staff after their contract expired is "absurd". The July 28, 2004 letter indicates Well-Being's contract expired at 6:30 am on September 9, 2004. After that time they no longer provided care services so they could not employ the staff. He suggests as equally incredible is the employer's suggestion that Well-Being and CareSource employed the care staff over the same 7 hour period of time from 12:00 am to 7:00 am on September 9, 2004. According to the service provider's agreement between CareSource and the Partnership, CareSource did not commence until 7:00 am on September 9, 2004. He also points out that the Record of Employment forms (ROE) issued to their employees by Well-Being indicated their last day of employment was to be September 8, 2004. Mr. Baugh contends that this agreement between CareSource and the Partnership was not actually concluded until December

2004; at least 3 months after the September 9, 2004 take over. That backdated document clearly states the agreement will commence at 7:00 am September 9, 2004. Mr. Baugh also points out that it would be impossible for the Partnership to have contracts with both CareSource and Well-Being at the same time as the agreement designates CareSource as the ' exclusive provider of such services to the facility'. A copy of the CareSource/Partnership agreement is included as Attachment **J**.

Mr. Baugh also commented on the letters of employment referred to by Mr. McDonald. He contends that few if any of them were signed on September 9, 2004 and several employees refused to sign them. The September 9, 2004 date on these letters indicates that if it is signed, it is the date of the employment agreement, not the date employment commenced. Further he contends that Article 1 of the employment agreement leaves the date of commencement of employment to be mutually agreed upon by the employee and CareSource. So, the date on which the employment agreement was made does not indicate when employment commenced, just as the date on the partnership's agreement with CareSource, September 1, 2004 does not indicate when the contract commenced.
One of the concerns expressed by Mr. McDonald in his response to my preliminary findings was that the discussion I had with a representative of CareSource was not an accurate reflection of the transaction between the Partnership and CareSource.

In my preliminary findings I reported that I had spoken with Mr. Ken Sim, President of CareSource. He advised that his company responded to a Request for Proposal to employ the staff at Nanaimo Seniors Village and took over at that site after Bayshore Health Care backed out. He and his staff met with the employees of Nanaimo Seniors Village on two occasions between August 4, 2004 and September 9, 2004. On the first occasion he was introduced to a group of about 70 employees by Administrator Sue Ball. A second meeting was held when the employees were interviewed by the CareSource team. After a comprehensive process that involved interviews, a review of personnel files, past performance, attendance and reference checks, a decision was made by CareSource to hire all but nine of the employees who had been working for Well-Being and the Partnership.

It was Mr. Sims' understanding that the employees they hired to work for CareSource September 9, 2004 were new employees to CareSource and that they have no obligations to them. The employees signed contracts of employment as new employees of CareSource. He acknowledges that generally, the conditions of employment remained the same: wages, scheduling vacations, statutory holidays, etc., but CareSource was a different employer so there may have been some different processes to follow.

A July 25, 2005 letter from CareSource, legal counsel Michael Howcroft explains that Mr. Sims was concerned that there had been a misunderstanding arising from our discussion. Mr. Howcroft states that their client is not related to either the Partnership or Well-Being and when it obtained the contract to provide care services to Nanaimo Seniors Village, the employees it hired who were formally employed by Well-Being, were new employees to CareSource. Mr. Sim confirmed that there was a seamless transition from Well-Being to CareSource, with no break between employers. Mr.

Howcroft advised that CareSource anticipated when it hired these employees, that it would be required to recognize the previous tenure of the former Well-Being employees. For the purposes of calculating vacation pay and termination pay entitlements under the Act. A copy of this letter is included as Attachment **K.**

I was not entirely clear on the full intent of Mr. Howcroft's letter, so I wrote to him to clarify if CareSource acknowledges that for the purpose of section 97 of the Act, the employment of the employees of the Well-Being Seniors Services Ltd. /Nanaimo Seniors Village Partnership to CareSource Solutions Inc is deemed to be continuous and uninterrupted? After some confusion with the correct spelling of the names, CareSource Solutions, through their legal counsel, confirmed they recognised that the provisions of section 97 applied to the September 9, 2004 transfer of staff. Copy included as Attachment **L**

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There were numerous submissions made on the issue of continuity of employment. Mr. Baugh addresses this issue in a lengthy submission in April, 2005. Their position can be summarised by saying that the Partnership or alternatively Well-Being, terminated the employees within the stipulated notice period prior to the employees commencing employment with CareSource at 7:00 am on September 9, 2004. Therefore, section 97 of the Act, which could deem their employment to be continuous and uninterrupted, does not apply. Mr. Baugh suggests this situation is analogous to the Tekmo Industrial Design Ltd. decision, BCEST # D 170/03 where an employee was given written notice of termination of his employment effective at 5:00 pm Friday, April 6, 2002. The purchaser of the business did not commence operations until Monday, April 8, 2003. The complainant was hired by the purchaser effective April 8 and continued until he was laid off June 15, 2002. The Tribunal Adjudicator found that section 97 did not apply to his full length of service with the business because the complainant had been terminated in accordance with the requirements of the Act on or before the disposition of the business to the purchaser.

In response, Mr. McDonald argues that the Tekmo Industrial Design Ltd. decision noted above is completely distinguishable from the facts of this case in that there was a two day break between the date of the disposition of the business and the time the new employer stepped in to take over. As a result of this two day break, the Tribunal was able to conclude that one of the preconditions needed to meet section 97 (that the employee was employed on the date of disposition and was absent) therefore, section 97 did not apply. He says this is completely different from the September 9, 2004 situation, where employment was continuous and uninterrupted and the disposition and acquisition occurred on the same day. In addition, he points out that when the Well-Being employees were advised, at the end of July 2004, that a new service provider was being brought into the facility, they were advised that every effort would be made to ensure continuity of care, which meant the same people doing the same jobs at the same terms and conditions of employment. Continuity of employment was always contemplated and that was in fact what happened. (Attachment **G)**

Mr. McDonald suggests that the circumstances found in the Gill decision (BCEST # D544/00) and the reconsideration of Gill, (BCEST # RD 040/02) the Maher decision,

more accurately apply to the facts surrounding CareSource is taking over as employer at Nanaimo Seniors Village. In these decisions, the Tribunal found the employment of Gill was deemed to be continuous and uninterrupted through a change in labour contractors when Mehar took over the contract to employ labourers at a saw mill. The finding of continuous and uninterrupted employment affected Gill's length of service and entitled him to more compensation when he was terminated by Mehar. This confirms that these types of contracting scenarios do fall within the parameters of section 97. The cancellation of the Well-Being contract and the re-tendering of the contract to CareSource are analogous to the cancellation of the Pacific Lumber contract, and the assumption of the contract by Mehar. The arrangements in Nanaimo Seniors Village situation were more formal, but the relationships between the parties are no different. The continuity of employment of the Well-Being employees to CareSource is also analogous as there was no cessation in employment for the employees hired on by CareSource when the Well-Being contract expired.

Mr. Baugh suggests there is a fundamental difference between the Gill case and this situation at Nanaimo Seniors Village in that the Nanaimo Seniors Village Partnership was always the owner and operator of that facility. It was the Partnership, in a letter signed by Mary MacDougall that cancelled the contract with Well-Being and thus is responsible for the September 9, 2004 terminations. Mary MacDougall was the CEO of the Partnership at that time. Retirement Concepts Seniors Services Ltd. is the 99.9 % owner of the Partnership. Mr. Baugh contends Well-Being is also100% owned and controlled by Retirement Concepts Seniors Services Ltd., had no independent existence from Retirement Concepts or the Partnership, had no internal corporate structure, employed no managerial personnel but was simply a front for both companies. Further, section 97 only applies if there has been a disposition of all or part of a business and he contends the Partnership did not dispose of all or part of its business to CareSource as there was no transfer of equipment, supplies, and goodwill or management personnel. An additional fundamental difference to the facts of the Gill case is the written termination of employment of all the care workers effective September 9, 2004. Mr. Baugh believes that both the Partnership and Well-Being are jointly and separately liable for payment of the group termination pay pursuant to sections 64 and 95 of the Act.

Mr. McDonald challenges the complainant's contention that the fact the employees were given written notice of termination to be effective September 9, 2004 renders section 97 inapplicable. He suggests that the provision of notice is irrelevant if the employment of the employees continues after the disposition. He refers the Tribunal's decision in Columbia Recycle(BCEST #D070/96) where an employee working for Columbia Wire was given written notice of termination effective May19, 1995. Columbia Recycle purchased the business under an agreement where the vendor would be responsible for any liabilities related to the employee prior to May 1,1995. The employee worked for the vendor May 2, 1995 and his ROE indicated his last day of work was May 2, 1995 and he commenced work in his normal position with the purchaser, Columbia Recycle, on May 3, 1995. He continued to work at this business until September 6, 1995 when he was terminated. Was the employee entitled to notice of termination or pay, in relation to his full period of employment at that business or did the provision of the ROE and the previous notice of termination restrict his entitlement

to the time he worked for Columbia Recycle? The Tribunal found that his employment continued uninterrupted and the fact that he received an ROE and notice of termination did not effect the application of section 97. The Tribunal relied on the provisions of section 67(1) (b) and did not accept that the notice given to the employee terminated his employment in light of the fact that the notice was effective May 19, 1995 and he continued working past that date. This section says that notice given under this part has no effect if the employee continues after the notice period ends.

Mr. McDonald also cites 510321 B.C. Ltd. Special Screencraft Printers Ltd. (BCEST #D 014/97) and Re: Kim (BCEST#D367/97) as cases where the Tribunal has confirmed that the provision of notice or an ROE has no effect on the application of section 97 as long as employment continues unaffected.

Mr. Baugh contends the Columbia Recycle decision is clearly distinguishable from this case on its facts. The complainant had been given written notice that his last day of work would be May 19, 1995 but he continued to work at the same facility past that date. In addition, pursuant to the agreement the parties made, the vendor was only to be responsible for employee related liabilities prior to May 1, 1995. The complainant continued to work for the vendor on May 2 and commenced work for the purchaser May 3. Not only did the complainant work past the May 1 date for which the vendor accepted liability, he continued to work for the purchaser after the May 19 date set for his termination.

He also suggests that Special Screencraft is distinguishable from this case and the Tekmo decision in that the employee in Special Screencraft was not given working notice and was not terminated on or before the disposition so section 97 did not apply.

As an alternative position Mr. McDonald suggests that should the Director find section 97 does not apply to the disposition of the Well-Being contract, it is necessary to examine the number of casual status employees in September to determine if they qualify for compensation under section 64. He points out that section 65 (1) creates an exemption from the termination provisions of sections 63 & 64 of the Act for employees who work on an on-call basis and can accept or reject shifts without an repercussions.

Mr. Baugh contends that the casual employees that are referred to are not employees that would be excluded under section 65(1) (a) of the Act and even if they were, there is still more that 50 regular care employees and 25 regular nursing staff that were terminated September 9, 2004. The casual employees, as Nanaimo Seniors Village calls them, are employed at the facility on an ongoing basis, they earn seniority based on the hours worked and are called for work on that basis.

Mr. Sim clarified the CareSource position regarding the September 9, 2004 take over and how they see section 97 applying to these employees. As I have noted earlier, there are two criteria that have to be met that accompany the application of section 97. Those criteria require that there has been a disposition of all or part of a business or a substantial part of the entire assets of a business and the employees are employed on the date of the disposition.

The employees received notice of termination August 4, 2004 saying their employment would be terminated at 7:00 am on September 9, 2004. This letter was confirmed by a memo dated August 6, 2004 confirming the August 4 notices were to be considered notices of termination. These notices to the staff were preceded by a July 28, 2004 letter from the Partnership to Well-Being terminating their contract at 6:30 am on September 9, 2004. Well-Being had been set up to employ the care staff at Nanaimo Seniors Village. When their contract to do so was terminated at 6:30 am they could no longer employ those care staff and it is unreasonable to suggest they could continue to be the employer until 7:00 am. However, Nanaimo Seniors Village Partnership, the corporation associated pursuant to section 95 is also the employer of the staff and effectively carried on as such until 7:00 am.

Mr. McDonald also suggested that both CareSource and Well-Being could have employed the care staff for a 7 hour period of time from midnight September 9, 2004 until 7:00 am when the CareSource contract took effect. I can see no logic in that suggestion. CareSource could not have employed these staff members prior to their Contract Service Providers Agreement commencing at 7:00 am September 9, 2004. The wording in section 2 of the agreement between CareSource and the Partnership naming CareSource as the exclusive provider of such services at the Facility also makes this suggestion difficult to accept. (Attachment **J**)

At the time the CareSource agreement took effect, they employed all but nine of the former employees. Mr. McDonald acknowledges that the employees received notice of termination effective at 7:00 am, but as they continued to work past that time, the notice of termination, pursuant to section 67(1) (b) has no effect. This section says;

> *A notice given to an employee under this Part has no effect if;*
>
> *(a) the notice period coincides with a period during which the employee is on annual vacation, leave, temporary layoff, strike or lockout or is unavailable for work due to a strike or lockout or medical reasons, or*
>
> *(b) the employment continues after the notice period ends.*

Mr. McDonald sites the Columbia Recycle (BCEST #D 070/96), Special Screencraft (BCEST # D014/97) and Kim (BCEST #D 367/97) decision from the Tribunal that support this contention.

Special Screencraft is a decision that deals with the disposal of a business or assets of a business and the continued employment of an employee. The adjudicator questioned whether the employee received notice of termination from the vendor prior to the sale/disposal of the business. As that was not established, it is not applicable to the circumstances surrounding this case with Nanaimo Seniors Village and does not support their argument.

Columbia Recycle also involves a disposal of assets or sale of a business but is distinguishable from the material case in that the notice of termination given by the vendor, was to be effective after the disposal and after the employee had worked 19

days for the purchaser. This is not termination at the same time as disposal as we are seeing here with Nanaimo Seniors Village.

Columbia Recycle is a correct application of section 67(1-b) in that the employee in question was working for Columbia Recycle prior to the effective date of the notice of termination and continued working for that same employer afterwards, therefore the notice was without effect.

I find no reference or application of section 67(1-b) in my review of the Kim decision. Rather it is an example of verbal notice of termination prior to a disposal or sale. Verbal notice did not meet the requirements of the Act, therefore employment was deemed to be continuous.

Section 67(1-b) is not an appropriate application in circumstances where the notice of termination coincides with the date of a disposal or sale of a business and I could not find any Tribunal decisions that interpreted the section in that manner. The Tribunal has however applied this section when an employee receives notice of termination and continues to work for the same employer after the notice expires as reflected in the Phil Van Enterprises(BCEST # D284/96) decision.

As noted earlier, there are two criteria that have to be met in order to trigger the deeming provisions of section 97 of the Act. There must be a disposition of all or part of a business or the assets of a business and the employee(s) must be employed on the date of disposition.

The Tribunal, in the Mitchell decision made the following comments with respect to a disposition;

> We note that the language of section 97 is broad in scope. Although it is natural to speak of 97 in relation to the sale of a business, it is the word dispose that is used in the legislation. The Interpretation Act defines dispose to mean the transfer, by any method and includes assign, convey, bequeath, divest, release and agree to do any of those things.
> The point we wish to make is that the language of section 97 is broad enough to include any disposition that results in a change in the legal identity of the employer.

Although not specifically included in the wording above, transfer by any method could also include the awarding of a contract. CareSource has acknowledged that they responded to a Request for Proposal (RFP) from the Partnership and were awarded a contract to manage and employ the care staff at Nanaimo Seniors Village.

Mr. Baugh has argued that there was no disposition because at all times the Partnership are the owner and operator of the facility and did not dispose of all or part of its business to CareSource. There was no transfer of equipment, supplies, goodwill or personnel.

Both Well-Being and the Partnership employed the care staff as associated corporations and it was the Partnership that issued the RFP to take over the provision of care and staff at Nanaimo Seniors Village.

With the broad interpretation given to the language of section 97, the awarding of the contract to CareSource is sufficient to meet the first criteria of section 97; that there has been a disposal. The original Gill decision made a similar finding that was supported in the reconsideration when the adjudicator acknowledged the labour contract was both an asset and part of the business of Pacific Lumber, the party disposing of the contract.

The second criteria to be met in triggering section 97, requires the individual(s) be employed on the date of disposal. This is the key to Gill being successful in his claim for compensation. His employment was found to be continuous and uninterrupted because he was <u>not</u> terminated prior to the disposition.

The Adjudicator in Gill said, in part,

> Section 97 is triggered when the individual is an employee of the business on the date of disposition. The disposition itself does not terminate the employment relationship.......However, unless appropriate arrangements are made so that the employment of such persons is terminated <u>on or before</u> the disposition is completed, these employees continue on as employees of the new employer (my emphasis)

This narrows the interpretation of the Act to provide that a termination on or before the disposition nullifies the second criteria needed to trigger section 97. The Tribunal in Primadona Restaurante (RD BCEST #D 046/01) affirmed that position saying, if an employee is terminated on or before the disposition, section 97 is not applicable.

Mr. Baugh relies on the Tekmo Decision (BCEST #D 170/03) which found an employee's employment was not continuous because that employee was given proper notice of termination and was terminated prior to the disposition. The letters received by the care staff on August 4, 2004 advised that their employment with Well-Being would end at 7:00 am on September 9, 2004. These letters were followed on August 6 by a memo posted on the notice board and signed by Administrator Sue Ball confirming the August 4 letters were notice of termination. He also points out that the employees were given Record of Employment forms that specified their last day of employment to be September 8, 2004.

Mr. McDonald argues that the Tekmo decision is distinguishable from this situation. In Tekmo there were two days between the effective date of termination and the date the new owner/purchaser took over the business. Whereas in this situation, there was no time between the disposition and the effective take over by CareSource.

The evidence received from Carol Crow, Human Resources Manager, was that the letters of August 4, 2004 and the memo of August 6, 2004, were intended to give the employees four weeks written notice of termination so their employment with Well-Being would end at 7:00 am September 9, 2004. There would be no purpose issuing the August 4, 5 & 6 2004 letters and memos if it was not to terminate the employees.

In reality, the employment of many ended before September 9, 2004. The schedule that spans this period of time reflects that staff such as Trishann Lapp last worked evening shift 3-10 pm September 6, 2004 making that the last day she worked for the Well-Being/Partnership. The next time she appears on the CareSource time sheet is for a 3-10 pm shift on September 12. Christy Boyce last worked evening shift 3-10 pm September 7 making that the last day she worked for the Well-Being/ Partnership. She first appears on the CareSource time records for a 7 am shift September 11. Correna McWillis last worked September 6 making that her last day of employment with well-Being/Partnership. Linda Kurtz worked day shift 7 am – 1 pm September 8. Her employment with Well-Being/Partnership ended at that time and she reported for work at 7 am September 9, 2004 working for CareSource. See schedule included as Attachment **M**.

The notice given to the employees met the employer's obligations under section 63 of the Act. As has been noted previously, the Gill and Premadona Restaurante decisions support the contention that if an employee is terminated on or before the disposition, section 97 is not applicable and there is no continuity of employment. A business that operates on a 24 hour a day and 7 days per week basis would never have a day or a time in a day when employees would not be working. The key to Tekmo is not that there was two days between the employees shifts but rather that the employee was terminated prior to the disposition and thus section 97 did not apply. Tekmo sites both Gill and Primadona thus supporting the *on or before* wording used in those decisions.

I find the care staff employees of Nanaimo Seniors Village were terminated on or before the disposition of the care services contract from Well-Being Seniors Services Ltd. and the Nanaimo Seniors Village Partnership, two companies associated pursuant to section 95 of the Act. In spite of the acknowledgement from CareSource that they recognise the employees continuity, making this finding results in one of the two criteria needed to complete the application of section 97 being absent and therefore that section does not apply to the disposition and does not provide any relief to the Well-Being/ Partnership from the obligation to give the proper notice required by sections 63 and 64 of the Act.

The Nanaimo Seniors Village opened in April 2001 therefore the four weeks written notice of termination give to the employees, meets the employer's obligations under section 63 of the Act and I therefore I find there has been no contravention of section 63. However, the complainants have also made a claim under section 64 of the Act alleging the employer failed to give group termination notice. Section 64 (1, 3, 4 & 5) of the Act are the relevant provisions and say;

(1) *If the employment of 50 or more employees at a single location is to be terminated within any 2 month period, the employer must give written notice of group termination to all of the following:*

(a) each employee who will be effected;
(b) a trade union certified to represent, or recognised by the employer as the bargaining agent of, any affected employees;

(c) the minister.

(3)the notice of group termination must be given as follows:

(a) at least 8 weeks before the effective date of the first termination, if 50 to 100 employees will be affected
(b) at least 12 weeks before the effective date of the first termination, if 101 to 300 employees will be affected;
(c) at least 16 weeks before the effective date of the first termination,; if 301 or more employees will be affected.

(4) If an employee is not given notice as required by this section, the employer must give the employee termination pay instead of the required notice or a combination of notice and termination pay.

(5) The notice and termination pay requirements of this section are in addition to the employer's liability, if any, to the employee in respect of individual termination under section 63 or under the collective agreement, as the case may be.

In the letters of complaint, Mr. Baugh alleged there were 123 care aides, activity aides and practical nurses affected by this termination. Because section 64 refers to employees at a single location, all employees at the location must be included in any count that determines the length of notice. The registered nurses employed at Nanaimo Seniors Village did not join with the other classifications in filing complaints but would need to be included in any count of employees. The last payroll dated September 8, 2004 reflects 112 care staff. Added to this number should be the nine employees who CareSource chose not to employ and were terminated within two months of September 9, 2004.

Ms. Crow acknowledged she was aware of the requirements to give group termination notice but they did not do so because it was thought there were less that 50 employees who would be covered by this provision and the balance of employees would be excluded by section 65 (1) of the Act.

My initial discussions with the Administration, staff representatives and payroll found that there were a large number of casual call-in staff and the payroll reflects this. The employees are called on a seniority basis, may work for one or two days a week, for three or four days a month or work for longer periods of time covering illness, vacation, WCB or maternity leaves.

With the assistance of the payroll department at Nanaimo Seniors Village I examined the payroll and found that on the last pay roll, September 8, 2004 there were 112 employees, 61 were full or part time and 51 were casual. The June 17th to 30th, 2004 payroll reflects 101 employees, 59 of which were full or part time and 42 were casuals. The June 1st to 16th, 2004 payroll reflected 96 employees, 59 of which were full time

and 37 were casuals. In all cases, there were more that 50 full or part time employees, sufficient to trigger the group termination provisions of section 64.

Ms. Crow has suggested that the balance of the employees on the payroll, the casual call-in employees would be excluded from the group termination provision by section 65(1) of the Act which says;

Sections 63 and 64 do not apply to an employee

(a) employed under an arrangement by which

(i) the employer may request the employee to come to work at any time for a temporary period, and
(ii) the employee has the option of accepting or rejecting one or more of the temporary periods

The Tribunal, in the Covert Farms Ltd decision (D 077/99) identified four conditions that must be established in order for an employee to come within the exemption. The first is that there must be an arrangement between the employer and the employer; (2) that the arrangement allows the employer to call the employee to work for temporary periods; (3) that the employee may accept or reject any temporary period of work and (4) that the employee may reject the temporary period of work without risk to future employment.

In Skeena Projects (BC EST # D 179/2001) where a civil technologist was employed for five years with short seasonal layoffs, the adjudicator accepted the argument that the complainant was clearly not hired to work on this or that temporary project, but rather was working on a wide range of projects on an ongoing basis. The fact that the complainant did not always work full time was because the employer did not always have projects for him to work on because of the nature of their business.

In Middleton (BC EST #D321/99) the Tribunal said: "In considering whether an employee is exempt from the statutory benefits provided by sections 63 & 64 of the Act, the purpose for the exemptions found in section 65, particularly those listed in 65 (1) a to e, should be considered. Generally, the exemptions apply to employees who work for temporary periods, of either uncertain or fixed duration, and whose employment prospects past the temporary periods are unknown."

The Director of Employment Standards sees this section applying to employees who work for temporary periods of time and who have the right to reject requests to work without suffering some sort of penalty or sanction from the employer. Temporary work is work that ends without expectation of work beyond that date. Accordingly, there is no need for notice. An employee who is called in to work to cover a short term illness, an employee who is offered two weeks work as vacation relief and is free to accept or reject either offer without consequences may be covered by this exemption. However, employees who are on a fluctuating work schedule but have an expectation of continued employment are covered by the provisions of sections 63 and 64. This interpretation together with Mr. Baugh's submission of April 4, 2005 where he contends

that the 'casual' employees worked on an ongoing basis, accumulate seniority and are called to work on that basis has caused me to re-examine the exclusion of the casual staff that I noted in my preliminary findings.

In an attempt to determine the application of this section to the casual call-in employees at Nanaimo Seniors Village, I have, with the Tribunal decisions in mind, interviewed by telephone, Administrator Sue Ball and a random sample of employees from the August 2004 seniority list.

Ms. Ball advised that all the employees at the facility are recorded on a seniority list for their department. There are full time, part time and casual employees in each category. When their facility first opened, they established a list of casual call-in employees to help with relief. Ms. Ball advised that when there is a need to call a casual for work, the administration looks at the seniority list and calls the person from that list with the highest seniority. A log is kept to record all the calls for work that each casual gets. These casuals may be called for a day or two or a month or if they are near the top of the seniority list, a week or two a month. The need for casual call-in staff fluctuates with the need for vacation relief, WCB, maternity or sickness relief. These employees are expected to be available for work and can turn down a call to work if they have other commitments without being excluded for future calls. The seniority list for casuals is up dated every three months. Ms. Ball advised that it would be unusual for a person to turn down a lot of shifts as their seniority gets them further work and is the primary consideration when applying for advancement.

Maureen Erasmus, a former employee at Nanaimo Seniors Village and one of the employees who was not offered work by CareSource Solutions, has advised that casual employees accumulate hours towards seniority and that is what entitles them to regular part time or full time positions. She did not recall any casuals experiencing problems if they turned down work. They remained on the list and would expect to be called again. She also recalled that some of these senior casual staff worked close to full time hours. Some were covering for employees on maternity leave or off work because of injury.

Shirley MacLennan is an RN at Nanaimo Seniors Village and was often required to make calls to nurses and others when staff called in sick or booked off work. She advised that they have always started at the top of the seniority list and work down until you find a person to fill the vacancy. Casuals often work 20-30 hours week if they are at or near the top of the seniority list and some work full time. Those with high seniority will get more call in the summer months and other vacation times of the year when there is a higher need for vacation relief. In September, 2004, she worked as a part time employee and she expected to be called to work to fill vacancies based on her seniority. She confirmed that there is no penalty for turning down a call to work.

Debra Cossey was a casual LPN and worked at NSV as well as another facility in 2004. She was hired as a casual and was told there would be lots of work for her. Call-in shifts were offered to the permanent part time staff first and then down the list of casuals. She was called at any time of the day and often pressured to take a shift because they were getting to the end of the casual list by the time they got to her. She turned down shifts when she could not take them and did not suffer any penalty for

doing so. She worked an average of four days per week and was led to believe that if she was patient and worked the call-in hours there would be a full or part time job for her in the future.

Colleen Rolls started in July, 2002 and was a casual care aide in 2004. She was hired on the understanding that she would work on the call-in list, be available for any shift that came up and as she built up seniority, she could work her way into a full or part time position. She does not recall turning down a shift and only restricted her availability when she went on vacation. She usually worked full time hours and noted that many of the other casuals did also.

Heidi Carlson worked as a care aide in 2004. She was hired March 9, 2002 on the understanding that she would be called for work on a seniority basis with the part time workers getting first call for available shifts and then the casuals would be called on a seniority basis. She understood that if she was available for all three shifts she would get lots of work and move up the seniority list. She did not accept every shift that was offered and was not penalized. She received regular work as a casual and worked full time in July, August and September 2004.

Kimberly Fontana worked as a casual LPN in 2004. When she was hired in 2001, she was told that she would be called for work on a seniority basis. Initially, she worked about two shifts a week but made herself available for more shifts by taking last minute calls and increased her seniority on that basis. At this same time, she was an RN student so attended school while working close to full time at NSV. She rarely turned down a call for work. Ms. Fontana was not interested in a full time position as an LPN, but she did count on regular shifts to help pay for her education.

Colleen Rolls worked as a casual care aide in 2004. Like some of the other staff interviewed, she confirmed that the part time staff was called first for shifts that were available and then the casuals on a seniority basis. She was expected to be available for all three shift rotations and rarely turned down a call to work. She was not interested in a part time job and expected that by responding to the calls she would work her way into a full time position.

Christina Gillard started at Nanaimo Seniors Village on July 21, 2003 and worked as a casual LPN in 2004. She confirmed that she was expected to be available for call-in shifts and rarely turned down the opportunity for work. She knows of no staff member who suffered any penalty for refusing a shift. All shifts were assigned on a seniority basis, she was lead to believe there would be lots of work and that it was to her advantage to build her seniority to get a full time position.

It is clear from the information these people provided, that some of the criteria set out in the Covert Farms decision apply to the casual call-in employees at Nanaimo Seniors Village. However, it is also clear from all of them that there was an expectation that there would be continued employment. They did not work for *periods of either uncertain or fixed duration with no prospects past that period nor was this temporary work without expectation of further employment.* The employer counted on them being available for individual shifts, blocks of shifts and longer term relief work and the

employees counted on and expected to be called in for future work. The seniority system guaranteed many of these employees future work. My review of the payroll records from pay periods approaching September 9, 2004, reflects that a large number of these casuals worked in each pay period and the employer routinely relied on that pool of casuals to staff the facility.

Based on the evidence produced in this investigation and the guidance taken from the Tribunal in the decisions previously sited, I find the casual call-in staff at Nanaimo Seniors Village are not employees who would fall under the exemption set out in section 65 (1-a) of the Act and are entitled to be included under the group termination provisions of section 64.

These casual employees should be included in any count made to establish entitlement to group termination under section 64 of the Act. The final payroll of September 8, 2004 reflected 112 employees. Section 64 (3) (b) requires notice of 'at least 12 weeks be given before the effective date of the first termination, if 101 to 300 employees will be affected'. Section 64(4) says that 'if an employee is not given notice as required by this section, the employer must give the employees termination pay instead of the required notice or a combination of notice and termination.'

These employees were not given notice of group termination as required by section 64 and did not receive termination pay as required. I find Well-Being Seniors Services Ltd. and Nanaimo Seniors Village Partnership, businesses associated pursuant to section 95 of the Act, are in contravention of section 64 of the Act. A contravention of section 64 attracts a penalty of $500.00. This contravention occurred September 11, 2004, when the employer failed to pay the employees in full within 48 hours of termination.

V. CONCLUSION

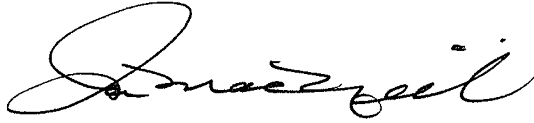
A Determination ordering the payment of wages has been issued under Section 79 of the Act. A calculation of the termination pay, annual vacation pay and interest owing to each employee is attached. The termination pay is calculated according to the definitions of termination pay and regular wage contained in the Act.

VI. ADMINISTRATIVE PENALTY

Section 29(1) of the Employment Standards Regulation, B.C. Reg 396/95, as amended, imposes an administrative penalty on a person who is found by the Director of Employment Standards to have contravened a provision of the Act or the Regulations.

As I have found you have contravened the following provision of the Act and Regulations the administrative penalty imposed pursuant to section 29 of the Employment Standards Regulation, B.C. Reg 396/95, is;

Contravention	Work Location	Date of Contravention	Occurrence (within 3 years)	Amount
Section 64	6085 Uplands Rd, Nanaimo B.C.	September 11, 2004	First	$ 500.00
Total Administrative Penalty Amount				$ 500.00



Ian MacNeill
Delegate of the Director
of Employment Standards