

An appeal

- by -

Body Rays Tanning Centre Ltd.  
("Body Rays")

- 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.:** 2002/584

**DATE OF DECISION:** February 6, 2003

## DECISION

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Body Rays Tanning Centre Ltd. (“Body Rays”) of a Determination that was issued on November 20, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Body Rays had contravened Part 8, Section 63 of the *Act* in respect of the employment of Dustin Szakacs (“Szakacs”) and ordered Body Rays to cease contravening and to comply with the *Act* and *Regulations* and to pay an amount of \$473.58.

In this appeal, Body Rays challenges the decision of the Director that Szakacs was entitled to the equivalent of three weeks wages as length of service compensation.

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 appeal is whether the Director erred in law in reaching the conclusion that Szakacs was entitled to the equivalent of three weeks wages as length of service compensation.

### FACTS

Body Rays is a tanning salon in Vancouver. Szakacs commenced employment at the tanning salon on June 1, 1999.

On March 28, 2002, Body Rays Tanning Centre Ltd. disposed of the business and assets of the tanning salon to Banman Global Communications Inc. The agreement included a provision giving the purchaser the right to use the name ‘Body Rays Tanning Centre’ and on June 4, 2002, Banman Global Communications Inc. changed its name to Body Rays Tanning Centre Ltd.

The agreement also contained a provision that the ‘vendor’ of the business would terminate all employees as at March 28, 2002, the date of disposition. On March 14, 2002, Szakacs was given a letter from the ‘vendor’, which read:

A note to tell you that there will be a change of ownership, so that I would need to terminate your employment @ Body Rays Tanning Centre: ending it on March 28, 2002.

Thank you for everything & all the best.

Szakacs re-applied for employment at the tanning salon on or about April 1, 2002. He was accepted for employment and commenced working for the ‘purchaser’ sometime between March 28 and April 2, 2002. Szakacs was terminated by Body Rays on July 11, 2002.

The Director considered two issues in the Determination: first, was there just cause to terminate Szakacs; and second, if just cause was not established, was Szakacs entitled to the equivalent of one week or three weeks wages as length of service compensation.

The Director found Body Rays had not proved there was just cause to terminate Szakacs and, accordingly, that he was entitled to length of service compensation. On the issue of the entitlement, the Director decided Szakacs was entitled to the equivalent of three weeks wages. In reaching that decision, the Director referred to and applied Section 97 of the *Act*, which says:

97 *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.*

The Determination contains the following analysis on the effect of Section 97 to the circumstances:

If the complainant's total period of employment with both employers is considered, then three weeks' wages are owed. If the complainant's period of employment with this employer only is considered, then he is entitled to one week's wages. In this case the employer bought the entire assets of the business. Therefore Section 97 applies.

The only reference in the Determination to the effect of the written notice of termination given to Szakacs by the 'vendor' is an oblique reference contained in the following excerpt:

The employer also argued that since the seller agreed to pay all liabilities for employees, including severance pay, the employer shouldn't be liable for compensation for length of service. However, the buyer and seller cannot, by private contract, nullify the requirements of a provincial statute.

## **ARGUMENT AND ANALYSIS**

I will state at the outset of this analysis that I have only identified one issue in this appeal, the issue involving length of service compensation, as there does not appear to be any appeal of the decision of the Director on just cause. All of the reasons listed by Body Rays for the appeal relate to the decision that Szakacs was entitled to the equivalent of three weeks wages as length of service compensation. Even if I am wrong in my assessment of the scope of the appeal, I do not find anything on the file or in the appeal that would persuade me the finding of the Director on the issue of just cause was wrong. I cannot say the same about the decision on the issue of Szakacs' length of service compensation entitlement.

On that issue, I find the Director erred in law in concluding Section 97 applied in the circumstances.

In *Dharampal Singh Gill*, BC EST #D544/00 (Reconsideration denied, BC EST #RD040/02), the Tribunal included the following summary of the interpretation and application of Section 97 of the *Act*:

Section 97 is triggered when the individual in question is an "employee of the business" on the date of the disposition. The disposition itself does not terminate the employment relationship; the employment relationship merely continues with the successor employer being, in effect, substituted for the previous employer as the employer of record. This is not to say that the new employer must continue to employ all of the employees of the former employer. However, unless appropriate arrangements are made so that the employment of such persons is terminated on or before the disposition is completed, those employees continue on as employees of the new

employer and retain all of their accrued rights and entitlements (including service-based benefits), but only insofar as the Act is concerned, vis-à-vis the new employer--see *Helping Hands Agency Ltd. v. B.C. Director of Employment Standards* (1995), 15 B.C.L.R. (3d) 217 (B.C.C.A.).

In *Director of Employment Standards (Re Primadonna Ristorante Italiano)*, BC EST #RD046/01 (Reconsideration of BC EST #D466/99), the Tribunal affirmed the position that the operation of Section 97 is contingent on there being a both a disposition and employment with the 'vendor' at the time of disposition. If an employee is terminated on or before the disposition, Section 97 is not applicable.

In this case, there was clearly a disposition. Equally clear is that Szakacs was terminated by the 'vendor' on or before the disposition. In the face of that fact, the Director was wrong to have concluded that Section 97 of the *Act* applied.

The appeal succeeds on the issue of length of service compensation. The matter does not, however need to be referred back to the Director. The result of the appeal is clear. The Determination will be varied to order that length of service compensation equivalent to one weeks wages, plus annual vacation pay and interest, be paid.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated November 20,2002 be varied to show an amount owing of \$157.86, together with any interest that has accrued from the date of the Determination pursuant to Section 88 of the *Act*.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**