EMPLOYMENT STANDARDS TRIBUNAL

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

Employment Standards Act S.B.C. 1995, C. 38

- by -

Columbia Recycle Ltd.
("Columbia Recycle")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO: 96/300

DATE OF DECISION: **August 19, 1996**

DECISION

OVERVIEW

This is an appeal by Columbia Recycle Ltd. ("Columbia Recycle") pursuant to Section 112 of the Employment Standards *Act* (the *"Act"*) against Determination No. CDET 001951 issued by a delegate of the Director of Employment Standards (the "Director") on April 15, l996. In this appeal Columbia Recycle claims that no compensation for length of service is owed to Joe Priller ("Priller").

I have completed my review of the information provided by the parties on this appeal and I have decided to confirm the Determination.

FACTS

Priller commenced employment with Columbia Salvage Ltd. ("Columbia Salvage") as a labourer/mechanic in the l970's. In late l993, Columbia Wire Ltd. ("Columbia Wire"), an affiliated company to Columbia Salvage, took over the equipment which Priller worked on, and, as a result, Priller was transferred to Canadian Wire's payroll with no interruption in his employment.

On March 24, l995, Priller was given written notice that his last day of work with Columbia Salvage and Columbia Wire would be May 19, l995.

On May 1, l995, Columbia Recycle purchased the business undertaking of Columbia Salvage and Columbia Wire (which is salvage) pursuant to an agreement entitled "Asset Purchase Agreement". One of the terms of the Agreement was that Columbia Salvage would remain responsible for any liabilities with respect to its employees prior to May 1, l995 (paragraph 6.8 Termination of Employees).

On May 3, l995, an ROE was issued by Columbia Wire to Priller which indicated his last day of work was May 2, l995. In the comments section it states: "Business sold - May 2, l995".

Priller's employment with Columbia Recycle commenced on May 3, l995. Columbia Recycle claims that for a few days prior to May 3, l995, Priller continued to work for Columbia Wire and/or Columbia Salvage at a work location different from that used for the salvage business. Priller claims he worked without interruption at his normal business site on May 1 & 2.

Priller worked at Columbia Recycle past the termination notice period of May l9, l995 which had been given to him by Columbia Salvage and Columbia Wire.

On September 6, l995, Priller was advised by Columbia Recycle that his employment was terminated effective September 8, l995. The ROE issued by Columbia Recycle indicates the reason for issuance as "A-Shortage of Work".

ISSUE

The issue to be decided in this appeal is whether Priller is owed compensation for length of service by Columbia Recycle.

ARGUMENTS

Priller claims his employment was continuous and uninterrupted from the l970's to September 8, l995 and that Columbia Recycle is responsible for paying him 8 weeks compensation for length of service (less 2 days as he was given notice on September 6, l995).

Columbia Recycle denies it owes any compensation to Priller.

Columbia Recycle argues that Priller was its employee only for the period commencing May 3, l995 and any responsibility for severance attributable to any period of time prior to that date ought to be the responsibility of Columbia Wire, Columbia Salvage or both.

It is conceded by Columbia Recycle that Priller's employment could be interpreted as "continuous and uninterrupted employment" given it was essentially the entire business undertaking that was sold. However, if it was, then Priller's claim should be against all three companies and not just Columbia Recycle.

Columbia Recycle also argues that there is a distinction between using all three employers for the purpose of determining the length of service and thus the appropriate length of notice, and using all three for the purpose of apportioning among them responsibility to pay severance. That is, the calculation of appropriate length of notice does not necessarily determine responsibility as to who has to pay severance in lieu of notice.

Columbia Recycle states that the effect of paragraph 6.8 of the Asset Purchase Agreement was to take the situation out of the provisions of the *Act* insofar as Columbia Recycles responsibility for severance pay arising under Section 97 of the *Act*. That is, the agreement between the vendor and purchaser served to sever Priller's employment in two so that it could not be considered continuous within the meaning of the *Act.*

Counsel for Columbia Recycle cited various excerpts from the text **Wrongful Dismissal** by David Harris ("Harris"). In particular, the following decisions, with Harris' comments on them, were referred to as being supportive of the appellants case:

White v. Stenson Holdings Ltd. (l983), l C.C.E.L. 21 (B.C. S. C), and the Ontario Court of Appeal decision **Addison v. M. Loeb Ltd.** (l986), 11 C.C.E.L. 100.

Columbia Recycle states that it did everything it ought to have done to protect itself against a claim by former employees of Columbia Salvage. The Asset Purchase Agreement clarifies as between Priller's employers which one ought to bear responsibility for pre-May 1, l995 and post- May 1, l995 employment.

Columbia Recycle also takes the position that there is no authority in the *Act* to hold the last employer in line solely responsible for the obligations of prior employers, where the employees employment is not continuous within the meaning of the *Act*.

Further, or in the alternative, Columbia Recycle claims that Priller's employment was not continuous given the two day gap where he continued to work exclusively for Columbia Salvage in activities totally unrelated to his employment duties in the salvage business. Columbia Recycle took over the business effective May 1, l995. Priller did not commence employment with Columbia Recycle until May 3, l995. For two days in between he worked directly for either Columbia Wire or Columbia Salvage.

In the further alternative, Columbia Recycle argues that Priller's employment was not continuous by operation of the working notice he received from Columbia Salvage.
He received working notice on March 24, l995 indicating his last day of work would be May 19, l995 (2 months). This is equivalent to 8 weeks compensation listed in the Determination. If Priller is entitled to severance it ought to be limited to the period between May 3, l995 and May 19, l995 for which Columbia Salvage ought to bear sole responsibility because Priller's ROE showed his last day of work to be May 2, l995 (not May 19 as set out in his notice).

Also, the two days notice referred to in the Determination ought to apply only for Priller's employment from May 3, l995 on. As such, Priller is not entitled to any notice in addition to the notice given on March 24, l995.

Finally, Columbia Recycle argues that if it is responsible for severance pay, its responsibility ought to be limited to the period commencing May 3, l995. When that sum is pro-rated against the notice Priller was entitled to arising from his employment with the two previous employers, the end result is the severance due to him ought to be borne entirely by the two previous employers.

ANALYSIS

Section 97 of the *Act* reads as follows:

> Sale of business or assets
>
> 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 by the disposition.

The leading case in British Columbia on the interpretation of this section is **Helping Hands Agency Ltd. v. British Columbia Director of Employment Standards** 96 C.L.L.C. 210-009 (B.C.C.A.). In that case the Court of Appeal allowed the appeal from the decision of Lander J. (reported at 90 B.C.L.R. (2d) 125) and held that the purchaser of a substantial part of the entire assets of the vendor company was responsible for payment of outstanding vacation pay accrued while the employees worked for the vendor company.

The case involved the sale of a business which provided home care services to the elderly. Helping Hands Agency Ltd. ("Helping Hands") purchased the business of Caring Hearts Health Services Inc. ("Caring Hearts") by way of an asset purchase agreement. Some of the employees were retained by Helping Hands. Following a complaint to the Employment Standards Branch, the Director found that those employees of Caring Hearts who had continued to work for Helping Hands were owed vacation pay which had accrued during their time with Caring Hearts. This decision was appealed to the Supreme Court.

Lander J. allowed the appeal and declined to hold Helping Hands responsible for vacation pay accrued by the employees while they were with their former employer. The Court dismissed the Director's submission that Section 96 of the old *Act* (now Section 97) operated to confer on the new employer all outstanding obligations toward the employees owed by the former employer.

The Court found that at common law, none of the obligations of a vendor/employer to its employees pass to the purchaser/subsequent employer. The common law proposition can be displaced, however, by either novation or by statute. Regarding novation, the Court found no evidence of the seller and purchaser reaching an agreement on, or even turning their minds to, the issue of outstanding vacation pay in the negotiations leading to the asset purchase. As a result, the obligation to pay the outstanding vacation had not been contractually assumed by the appellant such that novation could not be said to exist. Regarding the statute, the Court held that the *Act* deems years served with a former employer to be years served with a new employer, for the purpose of calculating severance pay and vacation entitlement. However, it was not willing to accept the argument of the Director that Section 96 confers on the new employer all outstanding obligations toward employees owed by the former employer. The Court held that the Director's position

regarding Section 96 was in contradiction to the doctrine of privity of contract, as it holds one responsible for the outstanding contractual obligations of another, and that in the Court's view, had the drafters intended such a departure from the common law notion of privity, they would have had to express it more clearly. In the end, the Court stated that the remedy for the employees was against Caring Hearts. In its decision, the Court relied on the **White v. Stenson** decision and Ontario cases dealing with the analogous provision in the Ontario *Act*, including **Addison v. M. Loeb**.

The issue before the Court of Appeal was whether the Supreme Court had failed to properly apply Section 96 of the old *Act* by failing to find the purchaser employer responsible for the obligations of the former employer to its employees. The Court of Appeal noted that consistent with Section 8 of the *Interpretation Act*, the *Act* is remedial legislation and "should be given such fair, large and liberal construction as best ensures the attainment of its objects". The Court also noted that the general purpose of the *Act* is to afford protection to employees for the payment of their wages which may not be available to them at common law. The Court found that the preconditions to the application of Section 96 had been met in that there had been a sale of the business of Caring Hearts to Helping Hands and the employees had been employed by the purchaser. The results that flow from these preconditions are that, for the purposes of the *Act*, the employment of the employee is not terminated by the sale and it is deemed to be continuous and uninterrupted by the sale with the effect that the purchaser is responsible for payment of vacation pay accrued during employment with the former employer.
In conclusion, the Court held that it could not agree with the interpretation given to Section 96 by Lander J., and his view was not supported by the authorities upon which he relied and he failed to give the section a broad construction.

The issue before me in this appeal is whether Columbia Recycle is solely responsible for the payment of compensation to Priller. Applying the Court of Appeal's reasoning in **Helping Hands,** I find that it is. The preconditions to the operation of Section 97 have been met in that there was a sale of a business and Priller was employed by the purchaser. I am satisfied that Priller's employment was continuous and uninterrupted by the sale. There is no evidence to support the claim that Priller worked in unrelated activities on May 1 & 2; his ROE indicated his last day of work with Columbia Wire was May 2; and he commenced work with Columbia Recycle on May 3.

The *Act* affords protection to an employee for the payment of the employee's wages which would not be available to the employee at common law based on the privity of contract. Section 97 of the *Act* provides that employment is deemed continuous "for the purposes of this *Act*". In my view, this means that any and all of the rights and benefits provided by the *Act* become the responsibility of the purchaser. Therefore, Columbia Recycle is responsible for payment of compensation for length of service to Priller.

Section 97 of the *Act* protects an employee's accrued statutory rights in a situation where there is a disposition of a business. The purchasing employer need not continue to employ old employees, but if it does so, it must recognize their accrued rights. Once an employee

starts work for a purchasing employer, the employee is entitled to full compensation or notice in lieu of compensation based on the employee's starting date with the selling or original employer. In this case, Priller had accrued continuous employment from the l970's to September 8, l995. Accordingly, he is entitled to compensation in the amount which is indicated on the Determination.

Columbia Recycle's submission that Priller received notice is without merit considering the provisions of Section 67 (1)(b) of the *Act* which states that notice of termination given to an employee has no effect if the employment continues after the notice period ends. Priller's employment continued past May 19, l995. Accordingly, the notice has no value.

For the above reasons, I conclude that Columbia Recycle is responsible for the payment of compensation to Priller.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 001951 be confirmed.

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Norma Edelman
Reigistrar
Employment Standards Tribunal

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