Employment Standards TRIBUNAL

An appeal

- by -

Strata Corporation NW 1018 carrying on business as Holly Park Lane
("HPL")

- 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 (as amended)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2014A/79

DATE OF DECISION: September 25, 2014

DECISION

SUBMISSIONS

G. Stephen Hamilton	counsel for Strata Corporation NW 1018, carrying on business as Holly Park Lane
Lynn Crosby	on behalf of Arthur Kyllonen
Joy Archer	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), the Strata Corporation NW 1018, carrying on business as Holly Park Lane ("HPL"), has filed an appeal of a determination issued by a Delegate of the Director of Employment Standards (the "Director") on May 27, 2014 (the "Determination").

2. The Determination concluded that HPL contravened Part 8, section 63 (compensation for length of service) of the *Act* in respect of the employment of Arthur Kyllonen ("Mr. Kyllonen"), and ordered HPL to pay Mr. Kyllonen wages and interest in the amount of $8,171.58.

3. The Determination also levied an administrative penalty in the amount of $500.00 against HPL for contravention of section 63 of the *Act*. The total amount of the Determination is $8,671.58.

4. HPL has appealed the Determination on the ground that the Director erred in law in finding that:

   (i) section 97 of the *Act* applied and Mr. Kyllonen's employment was continuous; and

   (ii) HPL terminated Mr. Kyllonen's employment.

5. HPL is asking the Employment Standards Tribunal (the "Tribunal") to cancel the Determination.

6. Pursuant to section 114 of the *Act*, the Tribunal has discretionary power to dismiss all or part of an appeal without seeking submissions from the parties. I initially considered HPL's appeal based solely on the following: (i) the appeal and written submissions of HPL, (ii) the Reasons for the Determination (the "Reasons"), and (iii) a review of the section 112(5) "record" that was before the Director when the Determination was made. I decided not to dismiss the appeal under section 114 and the Tribunal so advised the Director and Mr. Kyllonen on August 19, 2014, and asked both if they wished to provide written submissions on the merits of the appeal. The deadline for the submissions was set at 4:00 p.m. on September 3, 2014.

7. The Tribunal received written submissions from both the Director and Mr. Kyllonen. The Tribunal then disclosed these submissions to HPL, and afforded HPL an opportunity to file its final Reply by September 19, 2014, which HPL did.

8. Pursuant to section 36 of the *Administrative Tribunals Act* which is incorporated in the *Act* (pursuant to s. 103), and Rule 8 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In this appeal, none of the parties have requested an oral hearing and, in my

view, the appeal can be adjudicated on the basis of the "record", the written submissions of the parties, the Determination and the Reasons.

ISSUES

9. The issues in this case are twofold, namely:

(i) Did the Director err in law in finding section 97 of the *Act* applied and Mr. Kyllonen's employment was continuous?

(ii) Did the Director err in law in finding that HPL terminated Mr. Kyllonen's employment?

BACKGROUND AND FACTS

10. HPL is a strata corporation operating in Surrey, British Columbia.

11. On October 10, 2012, Mr. Kyllonen filed a complaint against HPL, alleging that the latter contravened the *Act* by failing to pay him compensation for length of service (the "Complaint").

12. The Delegate of the Director investigated the Complaint, and obtained submissions and evidence from the parties and their witnesses, which the Director summarizes in the Reasons. I will refer to the Reasons below as necessary.

13. It is undisputed, in the materials I have reviewed, that HPL initially employed Mr. Kyllonen as a maintenance worker on November 1, 1994.

14. During his employment, Mr. Kyllonen injured his back in the workplace and had been away on a couple of separate WCB-approved leaves, with the last one beginning at the end of January, 2011. He never returned to work from his last medical leave. Based on his Record of Employment ("ROE"), issued by HPL on August 16, 2012, Mr. Kyllonen's last day of employment was January 31, 2012.

15. In the investigation of the Complaint, HPL submitted to the Delegate that Wayne Campbell ("Mr. Campbell"), carrying on business as Strata Plus, also known as Strata Plus Maintenance, also known as Strata Plus Payroll, also known as Premier Strata Services ("Strata Plus"), was Mr. Kyllonen's employer, and not HPL. If compensation for length of service is owed to Mr. Kyllonen, HPL states it is owed by Strata Plus and not HPL.

16. Mr. Campbell was a Property Manager for a group of about five (5) strata properties, including HPL (collectively "the Properties"). Each of the Properties had their own maintenance person. However, the Properties began sharing labour. As a result, the task of keeping track of the hours worked by maintenance workers between the Properties became a full-time job. As indicated in the Reasons, employees would receive as many as five (5) different paycheques and T4 slips, one from each of the properties for which they worked.

17. In 2009, Mr. Campbell and his wife, Petra Campbell ("Mrs. Campbell"), created and became co-owners in Strata Plus. The purpose of Strata Plus was to provide payroll services to the Properties to properly address the labour exchanges between the Properties.

18. It would appear from the Reasons that the Properties individually entered into agreements with Strata Plus. The "record" submitted with the appeal shows the agreement between Strata Plus and HPL (the "Agreement") pursuant to which Strata Plus was to provide the following services to HPL starting in 2009:

> (a) to schedule staff to perform various tasks required in maintenance of the strata corporation based on availability of manpower;
>
> (b) to compile payroll for hours of work submitted;
>
> (c) to prepare payroll for the strata corporation; and
>
> (d) to submit payments to Revenue Canada on behalf of the Strata Corporation [*sic*].

19. The Agreement, in clause 2), provides:

> 2) **Employees:**
>
> The individual(s) dispatched, at all times, are and will, remain the employee(s) of the strata corporation.
>
> The strata corporation will at all times, while the employee is servicing the strata corporation, control, direct, discipline and be responsible for all employment costs including, but not restricted to, their wages, taxes and benefits. Although the strata corporation may assign the task to a third party or their Strata Manager, as their agent, the sole responsibility and obligations of the employer remains with the strata corporation.

20. In clause 9), the Agreement states:

> 9) **Indemnification:**
>
> Strata Plus is a payroll payment service provider. Employees are not the employees of Strata Plus but are the employees of the strata corporation who shall, during and after the termination of this agreement, indemnify and save Strata Plus completely free and harmless from any and all damages or injuries to persons or property, or claims, actions, obligations, liabilities, costs, expenses and fees arising from any cause whatsoever except if due to the gross negligence of Strata Plus or those for whom it is in law responsible, provided that Strata Plus is carrying out the provisions of this agreement.
>
> ….

21. Once the Agreement was in place, on the 15th and 30th of each month, Strata Plus provided HPL a detailed accounting of the work performed on HPL's property by each individual employee. HPL would then pay Strata Plus, and the latter, in turn, would pay each individual employee by cheque drawn on Strata Plus' account and signed by either Mr. Campbell or Mrs. Campbell.

22. Strata Plus was compensated by a fee it charged for each hour of work performed by individual employees on HPL's property. Strata Plus also collected and submitted statutory deductions required to be made with respect to each employee on behalf of HPL (and presumably other Properties).

23. Strata Plus also noted in the financial statements it created accrued potential liability of HPL for compensation for length of service that may need to be paid to any employees working on HPL's property at termination of employment. Strata Plus also set aside these funds in case it needed to pay termination pay in the future.

24. It is also noteworthy that as part of the service provided to HPL under the Agreement, Strata Plus also made the required statutory deductions from wages paid to individual employees who worked on HPL's property, and submitted those deductions to Revenue Canada ("CRA").

25. Strata Plus also issued T4 slips to employees with Strata Plus' office address as the contact address, with Strata Plus shown as the employer in some cases and HPL in other cases.

26. In terms of oversight of employees, Strata Plus provided each employee a document outlining their conditions of employment. That document, on the face page, was entitled "Strata Plus Maintenance Conditions of Employment". The conditions outlined in this document included the hours of work; sign-in/out procedure; logbook instructions; payday information; rules governing employees supplying own hand tools; lost, stolen or damaged equipment; educational subsidies; emergency call-outs; and other duties. The final page of the document delineated the "Common Grounds Task List" for all the Properties overseen by Strata Plus.

27. Also in terms of oversight of employees, Strata Plus directed the day-to-day activities of each of the employees. The employees were called into Mr. Campbell's office each day to sign-in and receive directions in terms of their duties and responsibilities. Employees were interchangeable and worked at all the Properties.

28. Strata Plus also sent employees to perform maintenance for other properties, not part of the Properties.

29. On November 15, 2011, as a result of some conflict not fully identified in the Reasons, Strata Plus withdrew, or terminated, its services under the Agreement to HPL. However, Mr. Campbell continued his employment as a Property Manager for HPL's property.

30. It is also noteworthy that Mr. Kyllonen's employment, at that time, did not terminate and Mr. Campbell, in his capacity as a Property Manager for HPL, brought Mr. Kyllonen back to work at HPL in November, 2011.

31. In mid-December, 2011, Mr. Campbell presented HPL with a cheque to sign covering Mr. Kyllonen's wages for the first two (2) weeks of December, and HPL executed the said cheque and paid Mr. Kyllonen his wages, as the latter was in need of money. Mr. Kyllonen worked for a total of about two (2) months with HPL, and the latter continued to pay him during this time, until he went on a WCB-approved leave for a workplace injury, commencing February 1, 2012.

32. In the Reasons, the Delegate identifies, under separate headings, the evidence of all parties and their witnesses. In the case of Mr. Kyllonen, the Delegate notes that Mr. Kyllonen chose to be represented by Lynn Crosby ("Ms. Crosby"), but also provided evidence on his own behalf. His evidence was that HPL, and not Strata Plus, was his employer, and that he never quit his employment with HPL, but that the latter terminated his employment.

33. Mr. Kyllonen states that in mid-August, 2012, he spoke with Blair Hendersen ("Mr. Hendersen"), a member of the Strata Council of HPL, expressing his desire to return to work as part of his WCB Back to Work Program, but Mr. Hendersen told him he was not coming back to work at HPL. Mr. Kyllonen interpreted this to mean that his employment with HPL was terminated, although he was not provided with a written notification or an ROE at that time.

34. Mr. Kyllonen also notes that in August 2012 he called Ilse De Bischop ("Ms. De Bischop"), the Chairperson of HPL's Strata Council, and requested an ROE for a non-work-related knee injury he suffered while he was

on his WCB-approved leave for his back injury. He states that he told Ms. De Bischop that he required the ROE for medical reasons so that he could apply for Employment Insurance. He states that Ms. De Bischop told him that he would be provided with an ROE if he submitted a letter of resignation. However, Mr. Kyllonen stated that he never provided a letter of resignation and did not convey to Ms. De Bischop that he was quitting his job, although he was getting desperate for money.

35. Later in the investigation, the Delegate reports, Mr. Kyllonen stated that he did say to Ms. De Bischop that he might be able to provide a letter of resignation, but he had no intention to do so because he was receiving benefits from WCB and was accepted into a "Back Program" and, therefore, it would make little sense to quit his employment with HPL.

36. He notes that on October 23, 2012, HPL finally issued the ROE, dated August 16, 2012, which he took to Employment Insurance, and there he was informed that the ROE showed "E" as the reason for its issuance. "E" stands for "quit". Based on this realization, Mr. Kyllonen decided to file the Complaint with the Employment Standards Branch (the "Branch") against HPL for compensation for length of service, as he considered his employment had been terminated.

37. Mr. Kyllonen submitted to the Delegate, during the investigation, that he worked for HPL continuously for over 17 years before his employment was terminated. He also stated that he was paid from Strata Plus on the 15th and 30th of each month and, as far as he was concerned, he was employed by HPL and always had been. He admitted that when Strata Plus was put in place, his T4 slips came from Strata Plus, but he was never a party to any agreements or discussions between Strata Plus and HPL and never voluntarily resigned from HPL to go to work directly for Strata Plus. He also stated that he was never a party to any of the discussions between Strata Plus and HPL when Strata Plus withdrew or terminated its services in November, 2011. He states that when Strata Plus was created in 2009, and, subsequently, when it withdrew its services in 2011, his employment was never severed, nor did he receive any vacation pay or an ROE, at either time.

38. Mr. Kyllonen also states that he started and ended his work day at HPL as it was the biggest property. He states that he reported to the shop every day, which was also on HPL property. He mentioned that he would call Mr. Campbell every day for direction on his daily activities, and he would also call Strata Plus to sign-in and sign-out every day. He confirmed that Mr. Campbell directed him to work at other properties and in some private residences separate from the Properties managed by Strata Plus during the period Strata Plus was operating. He states that while he received the majority of his daily directions from Mr. Campbell, there were times when owners would directly call the shop.

39. With respect to Ms. Crosby's submissions on behalf of Mr. Kyllonen, I note that most, if not all, of the submissions are consistent with what Mr. Kyllonen stated to the Delegate, and are largely repeated second-hand by Ms. Crosby. However, I do note that in Ms. Crosby's submissions, she states that on April 26, 2013, WCB contacted HPL to see if the latter would bring Mr. Kyllonen back to work, but HPL refused to bring him back.

40. With respect to the evidence of Strata Plus in the investigation of the Complaint, Mr. Campbell provided submissions on behalf of Strata Plus to the Delegate. According to the Reasons, Mr. Campbell said that he had been a Strata Property Manager for years and managed several different properties, including HPL. He also received payment as a Strata Property Manager from each of the Properties, independent of his business Strata Plus, which he ran separate from his role as a Strata Property Manager.

41. In terms of his relationship with Mr. Kyllonen, he notes that he did give daily direction to Mr. Kyllonen, but only in his role as Strata Property Manager, and not as a co-owner of Strata Plus. He also confirmed that

Mr. Kyllonen called his office to sign-in and sign-out each day, but he was acting in the capacity of a Strata Property Manager in that context.

42. Mr. Campbell further submitted that the intent, or purpose, of Strata Plus was to provide a payroll service to the Properties which were sharing employees because it had become a full-time job to manage the payroll of all different employees. The Properties, in signing a contract with Strata Plus, agreed they were to retain their role of "employer", and the employees would remain in an employment relationship with them and not Strata Plus. He submitted that HPL, as with the other properties, signed off on this understanding, and as result, HPL is Mr. Kyllonen's employer and always has been.

43. When a conflict arose between Strata Plus and HPL, Mr. Campbell states he withdrew the services of Strata Plus from HPL. However, he was instructed by the then-Strata Chairman, Steve Lazaroff ("Mr. Lazaroff"), to continue on as Strata Property Manager of HPL, and continue the employment of Mr. Kyllonen and other HPL employees until decisions were made at the strata meeting on December 19, 2011, and that is what he did.

44. On behalf of HPL, both Ms. De Bischop and Gary Sugrim ("Mr. Sugrim"), a maintenance worker at HPL's property, provided evidence.

45. Ms. De Bischop acknowledged to the Delegate that at the time of the transfer of the employees in 2009 from HPL to Strata Plus, their employment with HPL was not severed and the employees were not paid their accrued vacation, nor issued ROEs. However, she submits that in 2009, Mr. Kyllonen voluntarily left his employment with HPL to work for Strata Plus, and that during the period August, 2009, to December 1, 2012, Strata Plus was the only active employer on HPL property, and Mr. Kyllonen was one of its employees.

46. At the end of November, 2011, when Strata Plus withdrew its services from HPL, Ms. De Bischop states that Mr. Campbell decided that he was going to bring HPL employees back to HPL but did so without a motion from the HPL Strata Council. She states that she spoke with Mr. Campbell after Strata Plus had withdrawn its services from HPL, and the latter told her he was "bringing Mr. Kyllonen back as an employee of HPL" and that he was going to separate the accounts for the employees of HPL, of which Mr. Kyllonen was one.

47. Ms. De Bischop notes also that some of HPL's Strata Council members did not want Mr. Kyllonen to return to work for HPL and, as a result, at the November 30, 2011, Strata Council Meeting, the issue of compensation for length of service of Mr. Kyllonen was put on the agenda for discussion. At the meeting, while some members felt Mr. Kyllonen should be paid compensation for length of service for the period he had worked in the complex, it was unanimous that Mr. Kyllonen was not an employee of HPL and, therefore, if he was entitled to compensation, it should come from Strata Plus, his employer up until 2011.

48. Ms. De Bischop notes that after Mr. Kyllonen was brought back to HPL as an employee on December 5, 2011, he worked full time for HPL but was in a lot of pain and not able to perform his duties as a maintenance worker. At the end of January, 2012, Mr. Kyllonen provided Mr. Sugrim, HPL's Maintenance Superintendent, with a doctor's note stating that he was unable to work because of his existing work-related back injury and, thus, stopped working and applied for WCB benefits.

49. The Delegate notes in the Reasons that Ms. De Bischop "acknowledged by default and against its wishes HPL had become Mr. Kyllonen's employer again when they issued the cheque for wages in December, 2011". However, she states that HPL's council issued the cheque because "the council knew Mr. Kyllonen was desperate for money." The Delegate notes that while HPL accepts that it was Mr. Kyllonen's last employer, HPL states that it was only Mr. Kyllonen's employer for less than three (3) months before he went

off on medical leave at the end of January, 2012. Therefore, HPL argues that it has no responsibility to pay compensation for length of service. If Mr. Kyllonen feels he is entitled to compensation for length of service, Ms. De Bischop says that he should have received it from Strata Plus at the end of November, 2011, when Mr. Campbell returned him to HPL as an employee.

50. Ms. De Bischop also argues that if Mr. Kyllonen was employed by HPL for more than three (3) months, then he is not entitled to compensation for length of service because he quit. She states that she spoke with Mr. Kyllonen many times about his physical condition and whether he would be returning to work. However, he chose to quit his employment with HPL and not return to work. She states she never received a direct request from Mr. Kyllonen for an ROE. However, the Strata Manager received a letter from Employment Insurance stating that HPL had to issue an ROE to Mr. Kyllonen. After receiving the said letter, Ms. De Bischop states she called Mr. Kyllonen and informed him she had received a letter from Service Canada and asked him if he was resigning his position with HPL. According to Ms. De Bischop, Mr. Kyllonen responded clearly, stating "yes" he was quitting. Although Ms. De Bischop concluded that the ROE would be useless to Mr. Kyllonen because of the amount of time he had actually worked for HPL, she issued him the ROE anyway because he was resigning and this was the end of the relationship. Subsequently, she issued the ROE citing "quit" as the reason for issuing the ROE. She further explains that she had been doing payroll for many years and knew enough about it to know that she would have to issue the ROE with "illness/injury" as the reason if that was what Mr. Kyllonen had requested from her, but he clearly stated he was quitting his position. That is why she states she issued the ROE citing "quit".

51. Ms. De Bischop also states that she was afraid that HPL would be penalized for not issuing the ROE and, therefore, she went ahead and issued it, despite not receiving the requested letter of resignation from Mr. Kyllonen.

52. Finally, with respect to Mr. Sugrim's evidence, the latter states that when he started working as a maintenance worker, he was working for Strata Plus, and not HPL. He states that he reported directly to Mr. Campbell and the latter directed his daily activities. He states that Mr. Campbell directed him to work at all the Properties, including HPL. He also states that Mr. Campbell directed him to work at some private residences as well, and these were not part of the Properties.

53. Mr. Sugrim further states that he worked together with Mr. Kyllonen, and believes that the latter was aware (as he himself was) that all of the employees worked for Strata Plus, and not HPL. He further submits that Mr. Campbell told all employees that they were not to speak with the owners of HPL, especially Mr. Hendersen, as the employees were Strata Plus' employees and not HPL's employees. Mr. Sugrim also states that he and all other employees were given conditions of employment from Mr. Campbell which they had to sign. As with Ms. De Bischop, Mr. Sugrim states that Mr. Campbell brought Mr. Kyllonen back as an employee of HPL without authorization from the Strata Council. He states that he was not opposed to Mr. Kyllonen returning to work for HPL provided he was physically fit to return.

54. After reviewing the relevant evidence and submissions of the parties, the Delegate went on to determine three (3) questions, namely:

(i) Who was Mr. Kyllonen's employer?

(ii) What was Mr. Kyllonen's length of service with HPL?

(iii) Did Mr. Kyllonen quit his employment?

55. With respect to the first question, after reviewing the evidence in context of the definitions of "employer" and "employee" in the *Act*, the Delegate found the argument put forth by Ms. De Bischop that HPL was only Mr. Kyllonen's employer for the first part of his employment and the last few weeks of his employment meritorious. The Delegate concluded:

> For the period that Strata Plus was engaged to provide services to the various strata corporations, the evidence supports the conclusion that Strata Plus had control and direction over Mr. Kyllonen and it was Strata Plus that was also responsible both directly and indirectly for the employment of Mr. Kyllonen. Strata Plus issued T4's, and listed its address as the employers [*sic*] address; Strata Plus paid Mr. Kyllonen his wages; Mr. Campbell controlled Mr. Kyllonen's daily activities, and directed him to work at private residences that had nothing to do with HPL and/or its agreement with Strata Plus.
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> After November 2011, HPL accepts responsibility as Mr. Kyllonen's employer so this period is not in question.
>
> Therefore, I find that Strata Plus was Mr. Kyllonen's employer from April 2009 until mid-November 2011, when HPL agrees it resumed being Mr. Kyllonen's employer.

56. With respect to the second question - what was Mr. Kyllonen's length of service with HPL - the Delegate, reasoned as follows in concluding that Mr. Kyllonen's employment was continuous for 17 consecutive years from November 1, 1994 to January 31, 2012:

> Section 97 of the Act states if all or part of a business or a substantial part of the entire assets of a business are 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 wording of section 97 is very broad. It refers not only to the sale of a business, but to the disposal of all or part of a business or a business' assets. Disposal is defined in the Interpretation Act as a transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things. In determining whether there is or is not continuous employment it must be determined whether the employee or employees were currently employed when the business transferred.
>
> When an employer disposes of a business, the new employer must treat the employees who are employed at the time of the disposition as though their employment is continuous, and undisturbed by the sale. The new employer is required to honour the employee's past service with the previous employer and assume all of the previous employer's liabilities and obligations under the Act toward the employees.
>
> However, if an employer terminates an employee prior to the disposition of the business, any outstanding wages or compensation pay is the responsibility of that employer. The employee cannot obtain any outstanding wages or compensation from [the] new employer. The new employer is not obligated under the Act to recognize the employee's past service.
>
> In order for section 97 to **not** apply in this situation, HPL would have to show it severed Mr. Kyllonen's employment prior to the disposition in 2009 to Strata Plus, and more importantly that Mr, Kyllonen's employment had been severed by Strata Plus prior to the disposition back to HPL in November 2011.
>
> There is no evidence before me to support the finding that Mr. Kyllonen's employment was severed prior to either disposition. In November 2011 Strata Plus withdrew its services, and Mr. Kyllonen continued working for HPL. All amounts which had been collected on behalf of Mr. Kyllonen by Strata Plus, namely annual vacation pay, were returned to HPL and not paid out to Mr. Kyllonen. In addition, Strata Plus did not issue an ROE to Mr. Kyllonen, or provide him with any notice, written or verbal, that his employment was terminated prior to the disposition. Regardless of whether or not the strata council had voted to bring Mr. Kyllonen back to HPL, the moment he went to work for HPL and HPL issued a payment of wages, his employment was deemed continuous thereby making HPL responsible for any compensation or termination pay, or notice in lieu, calculated from the date he was originally hired, and any other outstanding wages including annual vacation pay.

> Consequently I find section 97 of the Act applies and Mr. Kyllonen's employment was continuous. I find Mr. Kyllonen was employed for seventeen consecutive years thereby entitling him to eight weeks [*sic*] compensation for length of service under section 63 of the Act.

57. With respect to the final question - whether Mr. Kyllonen quit his employment - the Delegate reviewed the evidence presented by both Ms. De Bischop and Mr. Kyllonen and applied the test for determining whether an employee quit or was fired set out by the Tribunal in *Burnaby Select Taxi* (BC EST # D091/96). Here the Delegate found both Ms. De Bischop's and Mr. Kyllonen's arguments plausible. More particularly, the Delegate found plausible Ms. De Bischop's argument that Mr. Kyllonen formed a subjective intent to quit his employment with HPL when he told her he was quitting his employment and agreed to provide a letter of resignation when he contacted her requesting an ROE. Similarly, the Delegate found plausible Mr. Kyllonen's argument that he requested an ROE to be issued for "illness/injury" for the injury he sustained outside of the workplace (which was not covered by WCB) and he never told Ms. De Bischop he was quitting his employment with HPL when requesting the ROE from her, nor did he agree to provide her with a letter of resignation. However, in concluding that Mr. Kyllonen did not quit his employment with HPL but that the latter terminated it, the Delegate reasoned that the onus falls on HPL to prove Mr. Kyllonen demonstrated both the subjective and objective intent to quit his employment with HPL, and HPL did not discharge that onus for the following reasons:

> Mr. Kyllonen acknowledged he told Ms. De Bischop he may be able to provide the letter of resignation she was requesting. I accept that this statement may have been interpreted by Ms. De Bischop as Mr. Kyllonen's agreement to cease working for HPL. However, Mr. Kyllonen's actions after the alleged 'quit' do not support that his intent was to quit his employment with HPL. I accept Mr. Kyllonen's evidence that he made this comment because he felt that was the only way he was going to get Ms. De Bischop to issue the ROE he required in order to apply for Employment Insurance benefits in order to obtain a source of income.
>
> Even if I were to accept Mr. Kyllonen formed the subjective intent to quit his employment by telling Ms. De Bischop he quit his employment and agreeing to provide a letter of resignation, he did not demonstrate his objective intent to quit by following the verbal declaration with the promised letter of resignation, and even further by filing his claim for compensation for length of service as soon as he became aware the employer had cited 'quit' as the reason for issuing the ROE.
>
> In addition, with all of the information and evidence provided by the parties, I find it hard to believe Mr. Kyllonen would quit his employment with HPL when he had an ongoing claim with WCB and had just been accepted into WCB's 'Back Program'. Mr. Kyllonen was on a medical leave for a work related injury covered by WCB, he requested an ROE for medical reasons (illness/injury) for a non-work related injury in order to continue his income source. For some reason it appears HPL was inclined to see the need to establish Mr. Kyllonen was voluntarily leaving his position with HPL to justify issuing the ROE. The evidence provided by HPL does not support that Mr. Kyllonen demonstrated a voluntary intention to quit his employment and does not pass the test to prove subjective and objective intent was displayed. I cannot find that Mr. Kyllonen had a reason or motivation to quit his employment with HPL.
>
> I find Mr. Kyllonen did not quit his employment with HPL, HPL terminated his employment and Mr. Kyllonen is entitled to compensation for length of service.

SUBMISSIONS OF HPL

58. Counsel for HPL has made written submissions on behalf of HPL challenging both the Director's finding that section 97 of the *Act* applied, and Mr. Kyllonen's employment was continuous; as well as the Director's finding that HPL terminated Mr. Kyllonen's employment.

59. With respect to the first, counsel states that the Director appears to conclude that Strata Plus and HPL "disposed" of its business or assets in a manner contemplated by section 97 of the *Act*, but the Director failed to identify what disposition actually occurred.

60. Counsel also submits that HPL was not operating any business and, in any event, it was not in the business of providing any of the services provided by Strata Plus. He states HPL only employed individuals, including Mr. Kyllonen, to provide labour. Mr. Kyllonen was a maintenance worker for HPL, and HPL did not sell Mr. Kyllonen's services to any third party or to anyone else for profit or to generate revenue.

61. Counsel refers to the definition of "business" in *Black's Law Dictionary* - "commercial enterprise carried on for profit" - to argue that HPL is not a "business". He also submits that HPL is a creature of the *Strata Property Act* (the "*SPA*") and the SPA expressly states that the *Business Corporations Act* does not apply to a strata corporation except as expressly provided in the *SPA*. The nub of counsel's argument here is that HPL not being a "business" cannot, therefore, be in a position to dispose of any "business". Therefore, section 97 of the *Act*, which requires disposition of a "business", cannot apply to render Mr. Kyllonen's employment continuous.

62. Counsel also argues that Mr. Kyllonen elected to take up employment with Strata Plus in 2009, presumably for what he perceived to be a more beneficial arrangement than his employment with HPL. He states the opportunity, or perhaps financial benefits, of working interchangeably with other strata corporations or residential properties appealed to Mr. Kyllonen and, in part, informed his decision to leave the employment of HPL. I note counsel does not provide any evidentiary basis in support of this argument.

63. Counsel further argues that "there was no transaction of any kind between Strata Plus and [HPL] whereby [HPL] *qua* vendor disposed of assets or a business enterprise to Strata Plus *qua* buyer". Counsel then refers to the decision of *Westfair Foods Ltd. v. Bento Noveau Ltd.*, 2008 CanLII 19744 (BC Labour Relations Board) as instructive in respect to what constitutes a sale or disposition of a business, and quotes extensively therefrom and argues as follows:

> Applying the principles described in the *Westfair* decision, it is clear that [HPL] did not carry on any business of which Mr. Kyllonen was an employee. Moreover, even if the Director was able to find that [HPL] carried on a business, the Appellant submits there was no transfer of business. In reviewing the factors described in *Lyric Theatre Ltd.,* BCLRB No. 38/80 (as cited in *Westfair* @ paragraph 42), there was no transfer of goodwill, logos, trademarks, customer list, account receivables, contracts or inventory as between Strata Plus and [HPL]. With respect, the Director fell in error by apparently viewing a business as being synonymous with its employees or the work it performs.

64. Counsel further submits that had the Director applied the correct legal principles in this case, "the Director should have concluded that there was no continuity of employment pursuant to section 97 of the *Act*, and Mr. Kyllonen's length of service with [HPL] ran from mid-November 2011 until January 31, 2012". Therefore, argues counsel, the Determination should be cancelled and the Tribunal should find that Mr. Kyllonen's length of service with HPL was eleven (11) weeks.

65. With respect to the Director's conclusion that HPL terminated Mr. Kyllonen's employment, counsel submits that HPL agrees with the Director's analysis regarding its failure to, or inability to, prove Mr. Kyllonen intended to quit his employment. Counsel argues, however, that:

> …the Director erred in law by finding that [HPL] intended to terminate Mr. Kyllonen, or did so by its actions. The law is settled that, to be effective, a termination must be clear and unambiguous, although no particular words are necessary to create a dismissal. It is the employer's expressed and not actual

> intention that matters in the determination of whether or not there has been an effective termination of employment. The burden falls to the employee to prove termination.

66. Counsel also submits that Mr. Kyllonen failed to prove that HPL terminated his employment. Counsel states that "(a)t best, Mr. Kyllonen proved that he and Ms. De Bischop misunderstood the conversation they were having with each other regarding the reason for issuing an ROE. Mr. Kyllonen failed to prove that [HPL] expressed any intention to terminate his employment". In the circumstances, counsel states the Determination should be cancelled.

SUBMISSIONS OF THE DIRECTOR

67. The Director, in arguing that section 97 of the *Act* applies to make Mr. Kyllonen's employment continuous, explains both transactions between HPL and Strata Plus in 2009 and 2011 respectively, starting with the first transaction in 2009:

> In this case, in 2009, HPL transferred (assigned, divested, granted and/or gave) the labour portion of its operation (part of its business) to Strata Plus. Initially by contract, Strata Plus was to be a 'payroll service' only, created to simplify payroll for the five Stratas and each of their individual employees. The contract signed by the Stratas, including HPL, contained an indemnification clause, which clearly stated each individual employee was to remain the employee of each individual Strata and was not to become an employee of Strata Plus. The definition of an 'employer' within the Act and the relationship which had developed between Strata Plus and each employee rendered that clause void.
>
> At the time the transfer occurred, Mr. Kyllonen was not consulted as to whether or not he wished to stay with HPL or transfer to Strata Plus, none of the strata employees were, this was decided solely between HPL (and the other four stratas) and Strata Plus. The employees were not notified of the transfer, nor was their employment severed in any way. They were not paid out their accumulated vacation pay; notified of the transfer to Strata Plus; provided with written working notice of the transfer to Strata Plus; or provided with a *Record of Employment* by HPL, or the other individual stratas. In fact, in this case, Mr. Kyllonen alleged he thought he still worked for HPL, and had been working for HPL for the 17+ years he had been doing the job.
>
> Contrary to [counsel's] statements at paragraph 14 of his submission, Mr. Kyllonen was not given the opportunity to '*elect*' to take up employment with Strata Plus for presumably what he perceived to be a more beneficial arrangement than his employment with the Strata Corporation (HPL), nor did he have the opportunity to make an '*informed*' decision to leave HPL for Strata Plus, this decision was made for him without notification from, or proper severing of his employment by HPL. Mr. Kyllonen did not miss a day of employment when the transfer occurred; it was '*business as usual*' as far as Mr. Kyllonen and the other employees were concerned. (italics mine)
>
> The transaction that occurred between HPL and Strata Plus was the signing of the contract, and the eventual transferring of the Strata employees (part of its business) to Strata Plus.

68. With respect to the second transaction in 2011, the Director submits:

> For the reverse in mid-November 2011, due to a falling out with HPL, Strata Plus transferred (gave, divested, assigned) its employees, Mr. Kyllonen in specific back to the individual stratas. Once again, the employees were not consulted; given notice of the transfer back or provided with written working notice of the transfer by Strata Plus. In addition, Strata Plus did not correctly sever the working relationship it had with the employees by paying out accrued vacation pay and by providing the employees with a *Record of Employment*; they just began working for the Strata Corporations again. Strata Plus transferred all of the funds it had been holding in the employees names [*sic*] back to the individual Stratas, once again the employees were not a part of or privy to this decision.

69. The Director then concludes:

> Consequently the Director respectfully submits that Section 97 of the Act does apply to this case as HPL transferred a part of its business to Strata Plus in 2009, and Strata Plus transferred all of its business to HPL mid-November 2011 and neither HPL nor Strata Plus severed its employees in accordance with the Act thereby making their employment continuous.

70. With respect to the second ground of HPL's appeal, namely, that Mr. Kyllonen failed to prove that HPL terminated his employment and, therefore, the Director erred in law in concluding HPL terminated his employment, the Director submits HPL established that it terminated Mr. Kyllonen's employment when it concluded that Mr. Kyllonen quit his employment and issued him a Record of Employment for that very reason.

71. The Director further submits:

> … In addition the following undisputed information provided by Ms. De Bischop and Mr. Kyllonen supported Mr. Kyllonen's position that HPL intended to terminate his employment with them:
>
> - Mr. Kyllonen stated prior to the issuance of the *Record of Employment*, while on medical leave mid-August 2012, he spoke with Blair Henderson ('Mr. Henderson'), Strata Council Member, about his return to work with HPL as part of the WCB Back Program, and Mr. Henderson told Mr. Kyllonen that he was not coming back to work at HPL;
> - When Mr. Kyllonen contacted Ms. De Bischop to request a *Record of Employment* for a non-work related injury, Ms. De Bischop told Mr. Kyllonen if he submitted a resignation letter she would provide him with a *Record of Employment*, Mr. Kyllonen had said nothing about resigning his position with HPL;
> - WCB contacted HPL to see if they would bring Mr. Kyllonen back to work and HPL refused to bring him back; and lastly
> - Ms. De Bischop provided information that after Strata Plus withdrew its services, HPL did not want Mr. Kyllonen to come back to work for HPL, that Wayne Campbell ('Mr. Campbell'), as Strata Property Manager, brought Mr. Kyllonen back to work for HPL without the strata's consent. The only reason HPL signed the cheque partly making Mr. Kyllonen its employee again was because HPL knew he needed money.

72. Based on the foregoing actions, the Director concludes that HPL established that it intended to terminate Mr. Kyllonen's employment, and did so.

SUBMISSIONS OF MR. KYLLONEN

73. Ms. Crosby, on behalf of Mr. Kyllonen, presented written submissions. I have read those submissions carefully and, while I do not propose to set them out verbatim here, I will try to summarize the gist of those submissions.

74. With respect to a question under section 79 of the *Act*, whether a disposition of a business took place between HPL and Strata Plus in 2009 and in 2011 respectively for the purposes of section 97 of the *Act*, Ms. Crosby simply submits that there was never "any intent for HPL to sell the business or transfer the business or transfer employees to Strata Plus", and Mr. Kyllonen "never became an employee of Strata Plus".

75. Ms. Crosby also submits that WorkSafe BC "recognizes, to date, HPL is [Mr. Kyllonen's] employer".

76. With respect to the matter of whether Mr. Kyllonen established that HPL terminated his employment, Ms. Crosby refers to section 66 of the *Act* and appears to suggest that Mr. Kyllonen's employment was terminated by HPL by virtue of the treatment that he was afforded by HPL or its representatives. In support of this submission, she, *inter alia*, relies on the incident (which the Director has also referenced in her submissions above) involving Mr. Hendersen of the Strata Council responding to Mr. Kyllonen in March, 2013, when the latter spoke to him about returning to work, and Mr. Hendersen responded "Not around here you're not". She also attaches some email exchanges between Mr. Hendersen and Strata Plus' in which Mr. Campbell quotes a passage from the Minutes of the Strata Council wherein there is a discussion of the strata having hired Gary Sigrum [*sic*] as a Maintenance Superintendent because HPL "needed a tradesman who would be physically capable of doing the work" since Mr. Kyllonen was "only capable of doing very light duties" and "now again on WCB". Ms. Crosby appears to suggest that the hiring of Mr. Sugrim "to replace Art Kyllonen in his tradesman position" is also evidence that HPL terminated his employment. She states that HPL was frustrated with Mr. Kyllonen being on WCB and terminated his employment, although "without the actual words 'You're Fired"'.

FINAL REPLY SUBMISSIONS OF HPL

77. On September 9, 2014, counsel for HPL submitted a final Reply on behalf of HPL. The final Reply is brief, consisting of eight (8) numbered paragraphs as follows:

> 1. The Strata Corporation respectfully submits that the Director is ignoring many of her own relevant findings of fact in respect of the application of section 97 of the Act.
>
> 2. The Director found as a fact that there were many changes to Mr. Kyllonen's 'employment' when he began working for Strata Plus. The following circumstances surrounding Mr. Kyllonen's employment with Strata Plus, as found by the Director, demonstrate that it was not 'business as usual' for Mr. Kyllonen:
>
>   (i) Strata Plus gave each of the employees a document outlining their conditions of employment with Strata Plus' name at the head of the document;
>
>   (ii) Strata Plus directed the day to day activities of each of the employees;
>
>   (iii) Each employee took direction from Strata Plus each day;
>
>   (iv) All of the employee were interchangeable and worked at all of the five strata corporations that Strata Plus contracted with to provide services; and
>
>   (v) Strata Plus issued T4's for Mr. Kyllonen and other employees.
>
> 3. The Director's submissions that 'Mr. Kyllonen did not miss a day of employment' is overstated as it ignores the Director's own finding that Mr. Kyllonen worked part-time for HPL (i.e., he worked at multiple strata corporations) during his employment with Strata Plus.
>
> 4. Moreover, the Director's submission that Mr. Kyllonen did not have the opportunity to make an 'informed' decision to leave HPL for Strata Plus or return to HPL in 2011 is made without any reasonable evidentiary foundation and appears to be speculative. The Director apparently did not ask Mr. Kyllonen why he did not exercise any of the remedies he may have had against Strata Plus if, in fact, Strata Plus failed to conclude Mr. Kyllonen's employment on a lawful basis.
>
> 5. The Strata Corporation submits that the Director appears to rely heavily on her finding of fact that 'Strata Plus did not correctly sever the working relationship it had with [its] employees' to reach the conclusion that s.97 applied to this case. However, whether or not there was any proper severance by Strata Plus is simply one factor to be considered in respect of the analysis required by section 97 of the Act and the relevant case authority.

6. The Strata Corporation submits the Director allowed the alleged failure by Strata Plus to properly sever the working relationship with its employees to overwhelm and misdirect the legal analysis required by section 97 of the Act.

7. The Director failed in the Reasons for Determination and reply submissions to focus her analysis to 'whether there has been a transfer of a business from a labour relations perspective': see *Westfair*.

8. The Strata Corporation submits that the Director has failed in her reply submissions to identify a 'transfer of a business' between Strata Plus and HPL and continues to place inordinate weight on Strata Plus' apparent failure to comply with its legal obligations in order to find a basis for liability against HPL.

ANALYSIS

78. I will analyze the two (2) issues in this appeal under separate subheadings below, commencing with the question of whether the Director erred in law in finding section 97 of the *Act* applied, and Mr. Kyllonen's employment was continuous and, thereafter, the question of whether the Director erred in law in finding that HPL terminated Mr. Kyllonen's employment.

1. Section 97 of the Act

79. The purpose of section 97 of the *Act* is to preserve the employment status of employees when their employer's business or business assets are transferred to a third party.[1] Section 97states:

> 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. [*Emphasis added*]

80. The wording of the section creates ongoing employment rights and entitlements for employees who continue to work for a subsequent third party or "successor employer" following the sale of a business or a substantial part of the business assets.[2] It entails that where there is a disposal, an employee's employment will continue with the successor employer and the successor employer will be responsible for any compensation or termination pay, or notice in lieu, calculated from the date the employee was originally hired.[3]

81. Section 97 is triggered when an individual is an employee of the business at the date the employer disposes of all or part of a business or a substantial part of the entire assets of a business to the successor employer. When such a disposal occurs, section 97 ensures that the employee's employment is not terminated. The Tribunal summarized this mechanism concisely in *Dharampal Singh Gill* ("*Gill*"):

> 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.[4]

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[1] *Dharampal Singh Gill*, BC EST # D544/00 (Reconsideration denied, BC EST #RD040/02) ["*Gill*"] at page 6.

[2] *Ibid.*

[3] *Mitchell v. British Columbia, Director of Employment Standards,* (1998) 62 BCLR 3rd 79 (BC SC) at page 91.

[4] *Gill*, *supra* note 1 at page 6.

82. Where section 97 applies, the employment relationship is deemed to continue with the successor employer unless appropriate arrangements are made to terminate the employment on or before the time the disposition is completed.[5] If arrangements are not made, then the employees continue on as employees of the successor and "retain all of their accrued rights and entitlements … vis-à-vis the new employer".[6]

a. Meaning of dispose

83. In order for section 97 to apply, the transaction between the original employer and the successor employer must be a "disposal". Since there is no definition for "dispose" in the *Act*, the definition found in section 29 of the *Interpretation Act* applies:

> "dispose" means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things. [7] [*Emphasis added*]

84. As noted in *John Werner Hartloff and Donald James Peters operating as Artech Machine & Tool* ("*Artech*"), the definition is inclusive, rather than exclusive, and encompasses a transfer by any method.[8] The Tribunal and courts have taken a purposive approach to interpreting this definition and, as a result, "dispose" has come to include far more forms of transfers than a mere sale.

85. *Carolyn Anne MacDonald operating as Bukowski's Restaurant* ("*Bukowski's*") is illustrative of the great range of transactions the word "dispose" catches.[9] In *Bukowski's*, Ms. Bestard was employed by Bukowski's restaurant (the "Restaurant"). Ms. MacDonald was a lender under a general security agreement ("GSA") with the owners of the Restaurant. The owners defaulted under the GSA and Ms. MacDonald seized the Restaurant's assets on February 6, 2004. On February 10, Ms. Bestard was informed that her employment was terminated. Notably, between February 6 and February 10, Ms. Bestard had been on her days off and did not work at the Restaurant. Then, on February 16, Ms. MacDonald incorporated a company which purchased and continued to operate the Restaurant.

86. The Tribunal held that Ms. MacDonald's seizure of the Restaurant's assets and its subsequent operation as a going-concern constituted a disposal under section 97. Simply by seizing the assets under the GSA, Ms. MacDonald achieved the incredible result of making herself Ms. Bestard's successor employer. The employment relationship was deemed continuous and uninterrupted from the date Ms. Bestard originally commenced work with the Restaurant until it was terminated on February 10. As a result, Ms. Bestard was entitled to, *inter alia*, wages, compensation for length of services and vacation pay totalling $18,253.36.[10]

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[5] *Gill, supra* at page 7, also *John Werner Hartloff and Donald James Peters operating as Artech Machine & Tool*, BC EST # D147/04 ["*Artech*"] at page 6.

[6] *Gill, supra* note 1 at page 7.

[7] *Interpretation Act*, RSBC 1996, C-238, section 29; *Artech*, *supra* note 5 at page 5.

[8] *Artech, supra* note 5 at page 5.

[9] *Carolyn Anne MacDonald operating as Bukowski's Restaurant*, ["*Bukowski's*"] BC EST # D193/05; also BC EST # D018/06 ["*Bukowski's 2*"].

[10] *Bukowski's 2, ibid.* at para 6, 41.

87. In coming to this decision, the Tribunal noted that the *Act* is remedial legislation with the objective of protecting employees and must be given a large and liberal interpretation, as per *Rizzo & Rizzo Shoes Ltd.*[11] The Tribunal also stated that "dispose" is not limited to sales agreements and cited the Reconsideration panel in *Re Mitchell*:

> Although it is natural to speak of section 97 in relation to the "sale of a business" it is the word "disposed" that is used in the legislation… 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…[12] [*Emphasis added*]

88. Counsel for Ms. MacDonald contended that "no matter how broadly the word 'dispose' is interpreted, it cannot be intended to cover an involuntary loss of business through seizure by a creditor".[13] The Tribunal rejected this argument and upheld that the meaning of dispose is broad enough to cover involuntary transactions where the business is continued as a going concern.[14]

89. In addition, the Tribunal found that Ms. Bestard's employment was deemed to continue as a result of the disposal even though she never physically worked for Ms. MacDonald, nor was she made an offer of employment.[15] That Ms. Bestard had been on her days off prior to being terminated did not change the finding that the employment relationship transferred over to Ms. MacDonald. Ms. MacDonald had not made the appropriate arrangements to terminate Ms. Bestard's employment prior to the disposal, as stated in *Gill* and *Artech,* and so the employment relationship was deemed to continue.[16]

90. In *Artech*, the Tribunal used a similar line of reasoning to find that an arrangement where the former employer agreed to give the successor employer the full use of equipment in return for the successor storing the equipment was a disposal under section 29 of the *Interpretation Act*.[17] Quite notably, in *Artech*, no money changed hands between the original employer and the successor.[18] However, the party using the equipment was deemed the successor employer as a result of the "disposal".

91. Moreover, in *Sladey Timber Ltd. ("Sladey")*, the Tribunal commented that a party can be deemed a successor employer under section 97 without having any assets or part of a business disposed to it. In *Sladey*, the successor employer argued that one of the main assets of the previous employer was not disposed to it but to a different entity, and merely used by that entity in the successor employer's business. In response, the Tribunal stated that "there is nothing in Section 97 that requires the disposition to be specifically to the

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[11] *Ibid.* at para 33, 31 citing *Rizzo & Rizzo Shoes Ltd* [1998] 1 SCR 27.

[12] *Bukowski's*, *supra* note 9 at para 34, citing *Re Mitchell* (BC EST #D314/97, #RD108/98) ["*Re Mitchell*"] at para 43. Note, the Tribunal's comments in *Re Mitchell* were cited favourably by the BC SC in *Mitchell v. British Columbia, Director of Employment Standards,* (1998) 62 BCLR 3rd 79 at page 91.

[13] *Bukowski's*, *supra* note 9 at para 21.

[14] *Ibid.* at para 21.

[15] *Ibid.* at para 14.

[16] *Gill*, *supra* note 1 at page 7; also, *Artech, ibid.* at page 6.

[17] *Artech, supra* note 5 at page 5.

[18] *Ibid.* at page 3.

employer" and found that the elements of section 97 were met even if some of the assets disposed of went to an entity other than the successor employer .[19]

92. The courts have confirmed the broad approach to construction taken by the Tribunal. In *Helping Hands Agency Ltd v British Columbia (Director of Employment Standards), ("Helping Hands")*, Mr. Justice Legg of the BC Court of Appeal, speaking for the court, stated:

> From my reading of the *ESA* as a whole I conclude that the general purpose of the legislation is to afford protection to the payment of an employee's wages which may not be available to the employee at common law.[20]

93. Mr. Justice Legg further commented that section 96 (the former section 97) required a "fair, large and liberal construction as best ensured the attainment of its objects".[21] In *Helping Hands*, the court used this construction to overturn a lower court's decision that section 96 could not be used to circumvent privity of contract.[22]

b. Meaning of all or part of a business, or a substantial part of the entire assets of a business

94. For section 97 to apply, not only must there be a disposal, but the disposal must pertain to "all or part of a business" or a "substantial part of the entire assets of a business". The disposal can meet either one of these thresholds to deem that employment continues. Further, as stated by the Court of Appeal in *Helping Hands*, the entirety of section 97 is to be given a fair, large and liberal construction, and this is exactly what the Tribunal has done.[23]

95. In *Sladey*, the Tribunal interpreted the words "substantial part of the entire assets of a business" quite generously. *Sladey* involved a review of a Determination – the Determination being that a logging business had disposed of its assets to another company in a manner that section 97 applied. The assets in question were a grapple yarder, two logging trucks, a low bed, and a timber quota, and were disposed of from T&T Trucking Ltd ("T&T") to Sladey Timber Ltd ("Sladey").

96. As part of the analysis in the Determination, the Director utilized the dictionary definition of the word substantial:

> … of real worth and importance; of considerable value; valuable; belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable; something worthwhile as distinguished from without value or merely nominal…

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[19] *Sladey Timber Ltd.*, BC EST # D360/02 ["*Sladey*"].

[20] *Helping Hands Agency Ltd v British Columbia (Director of Employment Standards)* 1995 CanLII 439 (BC CA) ["*Helping Hands*"] at para 18.

[21] *Helping Hands*, *ibid.* at para 32.

[22] *Helping Hands Agency Ltd v British Columbia (Director of Employment Standards),* 1994 CanLII 260 (BC SC).

[23] *Gill*, *supra* note 9, at page 6.

> … consisting of or relating to substance; not imaginary or illusory, real, true, ample to satisfy and nourish; possessed of means; considerable in quantity; being largely but not wholly that which is specified; significantly great…[24]

97. The Tribunal concurred with the analysis of the Director, and agreed that the disposal of the assets represented a "substantial part of the entire assets". However, the Tribunal stated that whether the assets disposed of represented a majority of the physical assets was not determinative. Instead, the key was that the assets acquired by the successor employer allowed it to step into an ongoing business:

> Whether the assets purchased … represent a majority of the "hard" assets belonging to T&T is not helpful in deciding whether the assets disposed of represented a 'substantial part' of the assets of a business. The assets which were acquired by Sladey allowed Sladey to step into an ongoing business operation. That much is apparent from the fact that T&T stepped out of the logging operation on a Friday and Sladey stepped into it on the following Monday.[25]

98. As a result, *Sladey* arguably set the bar low for an asset disposal to be caught under section 97 – the analysis is not how many assets are disposed of, but what the effect of the asset disposal is.

99. In *Gill*, the Tribunal qualified a transaction as being both an asset disposal and as being a disposal of "all or part of a business". *Gill* involved a labour contract being transferred between two employers, both operators of sawmills. Pacific Lumber Remanufacturing Inc. ("Pacific") operated one sawmill at one location, and Mountain View Specialty Products & Reload Inc. ("Mountain") operated a sawmill nearby. In addition to its sawmill business, Pacific supplied labour to Mountain. In particular, around 35 Pacific employees, on Pacific payroll, worked at Mountain's sawmill: they used Mountain's machinery, equipment and inventory, and worked only at the Mountain sawmill and not the Pacific sawmill.

100. The employees were supervised by Mr. Sidhu, also a Pacific employee. The relationship between Pacific and Mountain disintegrated since Pacific wanted to focus on its sawmill operation, and Pacific ceased acting as a labour contractor. Then, Mountain and Mr. Sidhu reached an agreement that he could take over the labour supply contract, via a newly incorporated company, Mehar.

101. Practically, this meant that Mr. Sidhu approached the Pacific employees working at Mountain and told them that Mehar would be their employer, but that they would work the same jobs, with the same terms and conditions at the Mountain sawmill. Mr. Sidhu would continue working as the employees' supervisor. It is notable that there were no physical assets exchanged when Mehar took over the labour supply, since the employees were just continuing to work at the Mountain sawmill. The employees were not terminated, but they were informed by Pacific that the labour supply contract between Pacific and Mountain had been terminated and awarded to Mehar.

102. The Tribunal found that Mehar became the successor employer under section 97 when it took over the labour supply. The Tribunal found that there had been a disposal and that it was a disposal of a substantial part of the entire assets of a business, and also a disposal of all of a business.

103. The Tribunal stated that as far as Pacific's labour supply business went, the only real asset was the labour supply contract itself – since all of the operations took place at Mountain's site. However, disposal of this asset represented all of the assets of Pacific's labour supply business:

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[24] *Sladey, supra* note 10 at page 3.

[25] *Sladey, supra* at page 4.

> … the actual labour supply contract with Mountain View (which, I understand, was a verbal agreement) was the only real asset (a *chose in action*, but an asset nonetheless) held by Pacific Lumber.[26]

104. As a result, the disposal met the threshold of being "a substantial part of the entire assets of a business". Simultaneously, the Tribunal found that the disposal was of "all of a business". Since there was only one asset (the labour supply contract) that represented the entirety of Pacific's labour supply operations, when that asset was disposed of, it was Pacific's "entire labour contracting 'business' that was 'disposed of'".[27] The Tribunal found there was compelling evidence that this was the case because all of the parties (Mountain, Pacific, Mehar) intended that Mehar would take over Pacific's labour supply operations, and because the employees' employment continued "unaffected by the changeover save for the identity of the employer".[28]

105. The Tribunal's decisions in *Gill* and *Sladey* highlight some interesting points regarding the application of section 97.

106. First, *Sladey* and *Gill* make it clear that an asset need not be a physical asset; a disposal of an intangible asset, like a contract, can be more than sufficient. Second, the analysis under a "substantial part of the entire assets of a business" looks at whether the assets disposed of allow the successor employer to step into an ongoing business – and, as a result, there is no threshold percentage of the entire physical assets that needs to be disposed of.

107. Further, the Tribunal's decision in *Gill* suggests that the Tribunal has taken a very broad approach to characterizing what constitutes a *"business"*. In *Gill*, the disposal of a single, intangible asset (the labour supply contract) was found to be the disposal of an entire business, since the employees were able to continue their employment undisturbed by the disposal.

108. This is noteworthy because Pacific was in the same business as Mountain – operating a sawmill, and in addition to that provided labour supply services. Pacific also continued as a business after it stopped providing labour services to Mountain. So, arguably, Mehar at most received part of Pacific's business and not the entirety of it. Arguably the Tribunal did not have to classify this disposal as being of all of a business, since even the disposal of part of a business would be caught under section 97.

109. However, *Gill* showed the Tribunal's willingness to characterize a disposal as being of an entire business. In its analysis, the Tribunal did not consider whether the entire business of the original employer (Pacific) was disposed of, but whether the operations that were disposed of constituted all of a business on its own. In *Gill*, the intention was that the operations continue, and that the employees' employment was to be undisturbed by the transaction aside from a change of name on the payroll, so the Tribunal found that this segment of Pacific's operations constituted a "business" in its own right. As a result, Pacific disposed of "all of a business" (i.e. labour contracting services) even though it did not dispose of all of <u>its</u> business.

110. The Tribunal employed similar reasoning in *SoftSearch.com Inc. and Synergy Computer Consulting Ltd.* ("*SoftSearch*").[29] In *SoftSearch*, a division split off from its parent company: SoftSearch purchased its parent company's software information services and trade name and decided to go into business for itself. Similar to *Gill*, the parent company did not dispose of its entire business to SoftSearch, but only that part that

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[26] *Gill*, *supra* note 9 at page 7.

[27] *Ibid.*

[28] *Ibid.*

[29] *SoftSearch.com Inc and Synergy Computer Consulting Ltd.,* BC EST # D025/03 ("*SoftSearch*").

SoftSearch was responsible for already. The Tribunal deemed the employment was continuous under section 97 since there was no evidence that the employee's duties were different, or that the work location, reporting relationships or compensation were any different, as a result of the sale.[30]

c. "Disposal" between HPL and Strata Plus

111. The first transaction between HPL and Strata Plus occurred in 2009 when Strata Plus and HPL entered into a direct agreement for Strata Plus to effectively take over the payroll aspect of HPL's business. Although this was not a sales agreement, it should be noted that in *Bukowski's* and *Re Mitchell*, the Tribunal stated that the word disposal is broad enough to cover ***any*** transaction where the legal identity of the employer changes.[31] Under the first transaction, Strata Plus agreed to take over payroll and, thereby, agreed to pay Mr. Kyllonen – making itself Kyllonen's new employer. In addition, there is no requirement that money needs to exchange hands for it to be a disposal, but in this transaction it does.[32] Strata Plus is paid by HPL to takeover payroll services. In addition, the transaction directly involves a transfer of the payroll services between HPL and Strata Plus (even though there is no requirement that it be direct).[33] Therefore, I find this first transaction qualifies as a disposal.

112. In the second transaction, in November 2011, payroll services revert back from Strata Plus to HPL when their relationship disintegrates. Arguably this was an involuntary transfer, since HPL had no choice but to take over payroll after Strata Plus refused to perform payroll work for HPL. However, as per *Bukowski's*, whether the successor employer agreed to accept the employment is not part of the consideration.[34] The fact is that HPL reverted to dealing with its own payroll and was once again paying Mr. Kyllonen from its payroll, and so the legal identity of the employer changed. I find that the employment of Mr. Kyllonen is deemed to continue unless Strata Plus made an arrangement to terminate employment before the second transaction, which it did not.[35] Further, Mr. Kyllonen performed work while being paid by HPL after the second transaction occurred and before the termination of his employment. Even though it is not a requirement that the employee actually performs physical work (as was the case in *Bukowski's*), the fact that Mr. Kyllonen performed work only strengthens the case that there was a disposal.[36] Therefore, in my view, the second transaction qualifies as a disposal under section 97 of the *Act*.

d. All or part of a business or a substantial part of the entire assets - the first transaction

(i) Substantial part of the entire assets

113. The first transaction discussed above involved HPL disposing of its payroll services to Strata Plus in 2009. Only the intangible asset of the payroll services "contract" was disposed of, since Mr. Kyllonen continued to work under the exact same conditions at the same location, with the same supervisor and using HPL's assets after the first transaction.

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[30] *Ibid.* at page 8.

[31] *Bukowski's*, *supra* note 9 at para 34, citing *Re Mitchell* (BC EST # D314/97, # RD107/98) ["*Re Mitchell*"] at para 43.

[32] *Artech, supra* note 5 at page 3.

[33] *Sladey*, *supra* note 19.

[34] *Bukowski's*, *supra* note 9 at para 21.

[35] *Gill*, *supra* note 1 at page 7; *Artech, supra* note 5 at page 6.

[36] *Bukowski's*, *supra* note 9 at para 14.

114. Although no physical assets were disposed of in the first transaction, the agreement to have Strata Plus take over payroll represented the disposition of a single intangible asset which was the only real asset in HPL's payroll operations. This is identical to the scenario in *Gill* where the only real asset being transferred was the labour supply contract, and all the other operations, including the employee's supervisor, stayed the same. [37] It should also be noted that there is no consideration given to the fact that the assets do not represent a majority of the hard assets of a business – it does not matter that HPL is a strata complex and the payroll operations only represent one aspect of its business. As per *Sladey,* the key is that the first transaction allowed Strata Plus to step into an ongoing business of providing payroll services – the newly formed company seamlessly started managing HPL's payroll and Mr. Kyllonen's employment was not affected in any way except for a change of name on the payroll.[38] As a result, I find the first transaction a disposal of a "substantial part of the entire assets of a business".

(ii) All or part of a business

115. In addition, it is arguable that the first transaction may also be a disposal of an entire business. In *Gill*, the Tribunal found that the disposal of a single, intangible asset – the labour services contract – represented the entirety of Pacific's business of supplying labour services.[39] After the contract was transferred over, Pacific was no longer in the business of supply labour services, but Mehar was, when it had not been before. The first transaction here is very similar – a single, intangible asset, namely, the agreement to take over payroll services, is disposed of. After the first transaction, payroll is no longer part of HPL's operations, but it is now part of Strata Plus' operations. Further, as per *Gill*, it does not matter that payroll is only a small part of HPL's entire business. In *Gill*, it is noteworthy that supplying labour was only part of what Pacific's business was (the main business was running the sawmill) and the Tribunal still considered it a disposal of an entire business.

e. All or part of a business or a substantial part of the entire assets - the <u>second</u> transaction

(i) Substantial part of the entire assets

116. The second transaction, in November 2011, resulted in HPL taking over payroll after the agreement with Strata Plus falls apart. In this case, Strata Plus also has payroll operations with other strata complexes – so the single payroll agreement with HPL does not represent the entirety of the assets in its payroll services business. However, again, the test in *Sladey* says that it is not whether the asset disposed of represents the majority of the assets of the original employer, but whether the asset allows the successor to step into an ongoing business.[40] The transition between Strata Plus and HPL in the second transaction is, once again, seamless – Mr. Kyllonen's employment is not affected. HPL, which had not provided any payroll services since the first transaction, is now back in the business of providing payroll services. As a result, the disposal of the payroll services back to HPL lets the latter step into an ongoing business, and the disposal meets the asset threshold.

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[37] *Gill*, *supra* note 9 at page 7.

[38] *Sladey, supra* note 19 at page 4.

[39] *Gill*, *supra* note 9 at page 7.

[40] *Sladey, supra* note 19 at page 4.

(ii) All or part of a business

117. The question here is whether the disposal of a single payroll services agreement on Strata Plus' part constitutes the disposal of an entire business. Unlike *Gill*, and unlike in the first transaction, the single contract between HPL and Strata Plus does not represent the entirety of Strata Plus' payroll services business. Strata Plus continues to be in the business of providing payroll services to other strata complexes. It should be noted that in *Gill*, when Pacific disposed of the labour supply contract to Mehar, Pacific was no longer in the business of supplying labour, and that is why the Tribunal said Pacific's "entire" labour supply business had been disposed of. [41] In the case at hand, I do not find the disposal in the second transaction as being of "an entire business" since Strata Plus is in the business of providing payroll services to other strata complexes as well. However, I am persuaded that a disposal of a single agreement with HPL would, at the least, constitute "part of a business" (if not a substantial part of the entire assets) and bring it under section 97.

118. In the result, I find that the Director did not err in law in finding that section 97 of the *Act* applies and Mr. Kyllonen's employment was continuous. More particularly, I find both the first and second transactions between HPL and Strata Plus to be "disposals" under section 97 of the *Act*. As indicated, both the Tribunal and the courts have found that the word "disposal" includes far more than the sale of a business. Further, the requirement of "all or part of a business or a substantial part of the entire assets of a business" has been given an expansive interpretation as well. The first transaction would be a disposition of both types, while the second would at least be a disposal of a "part of a business" or a substantial part of the entire assets of a business. As a result, both the first and second transactions are caught under section 97 of the *Act,* and HPL is liable to Mr. Kyllonen for any employee rights and entitlements owed as calculated from the date he commenced employment with HPL in November 1994.

119. I note that counsel for HPL relied extensively on the BC Labour Board's decisions in *Westfair, supra*, and *Lyric Theatre Ltd., supra,* which do not deal with section 97 of the *Act* but with successorship provisions in the *Labour Code*. I find more persuasive, relevant and applicable to the facts in this case, the principles set out in the Tribunal's decisions on section 97 of the *Act* to which I have referred in this decision, including the Court of Appeal's decision in *Helping Hands, supra.*

120. I am also not persuaded with counsel's argument that HPL is not a "business" but a creature of the *SPA* and therefore section 97 of the *Act* cannot apply to HPL. Counsel, in advancing this argument, relies on the following definition of "business" in Black's Law Dictionary (7th ed.): "A commercial enterprise carried on for profit". While HPL may be a creature of the *SPA*, this does not, in my view, limit the application of the *Act* to HPL where HPL has entered into an employment relationship with an "employee" as defined under the *Act*.

121. I also do not find the limited definition of "business" in the *Black's Law Dictionary* counsel has relied on to advance this argument persuasive. Having said this, since counsel has relied on labour law cases in his submissions, I find more useful and complete the definition of "business" provided by the Canada Labour Board in *Metropolitan Parking Inc.*[42] that the BC and other Labour Boards across Canada have consistently referred to and applied:

> While one usually thinks of a business as a profit-making economic activity, the term 'business' in The Labour Relations Act cannot be so restricted. The Act also applies to municipalities, public libraries, universities, school boards, hospitals and other non-profit service undertakings which have employees and

[41] *Gill*, *supra* note 9 at page 7.

[42] **[**1980**]** 1 Can LRBR 197

> engage in collective bargaining. The economic activities of these entities are of an entirely different character from those of commercial enterprises, yet the definition of 'business' must be broad enough to include them. Even a wholly commercial enterprise will consist of many elements, some of which will be integral, and others merely incidental, to the total undertaking. And, in the case of undertakings in the service sector, 'know how', managerial systems and other intangibles are likely to be more important factors in the overall organization than particular physical plant and equipment.
>
> A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a *dynamic* activity, a 'going concern', something which is 'carried on.' A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a 'business' from an idle collection of assets.

122. While HPL is a strata under the *SPA* and its economic activities are different than those of commercial enterprises, I find it is a "business" for the same reasons that the Board in *Metropolitan Parking Inc.* considers "non-profit service undertakings" to be included in the definition of "business".

123. In conclusion, for all of the reasons delineated above, I am not persuaded that the Director erred in law in finding that section 97 of the *Act* applied and Mr. Kyllonen's employment was continuous.

124. I also add that I have carefully reviewed the final Reply submissions of counsel for HPL and, particularly, his argument that the Director, in her written submissions, *inter alia*, is ignoring many of her own findings of fact in respect of the application of section 97 of the *Act*, and fails to identify "transfer of business" between Strata Plus and HPL, and continues to place inordinate weight on Strata Plus' apparent failure to comply with its legal obligations in order to find a basis for liability against HPL. I respectfully do not agree with counsel. I find counsel's arguments in the final Reply are based on a very narrow construction of section 97 of the *Act*, which is not supported in the Tribunal's decisions to which I have referred earlier, including the Court of Appeal decision in *Helping Hands, supra.* In the result, I dismiss HPL's appeal based on the contention that the Director erred in law in finding section 97 of the *Act* applied, and Mr. Kyllonen's employment was continuous.

2. Termination of Employment

125. HPL, as indicated, argues that Mr. Kyllonen failed to prove that HPL terminated his employment and, therefore, the Director erred in law in concluding that HPL terminated Mr. Kyllonen's employment.

126. The Tribunal has adopted the following definition of "error of law" set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (BCCA):

> (1) a misinterpretation or misapplication of a section of the Act;
>
> (2) a misapplication of an applicable principle of general law;
>
> (3) acting without any evidence;
>
> (4) acting on a view of the facts which could not reasonably be entertained; and
>
> (5) adopting a method of assessment which is wrong in principle.

127. Having reviewed the Reasons, I find the Delegate correctly applied the test for determining whether an employee quit or was fired delineated by the Tribunal in *Burnaby Select Taxi*, *supra,* to the facts in this case. I also find that the Delegate properly considered all relevant evidence adduced by both Mr. Kyllonen, as well as HPL's witness, Ms. De Bischop. While the evidence, in part, was conflicting, and the Delegate found both

Ms. De Bischop's and Mr. Kyllonen's arguments plausible, the Delegate, in my view, properly assessed all the evidence and persuasively set out the basis of her conclusion at page R13 in the Reasons which I have quoted verbatim at page 10 of this decision. I am not persuaded in this case that the Delegate made a palpable or overriding error or reached a clearly wrong conclusion of fact or acted without any evidence or on a view of evidence that could not reasonably be entertained.

128. I also find the Director's following submissions on the matter persuasive and supportive of the delegate's conclusion, in the Determination, that HPL intended to, and did terminate, Mr. Kyllonen's employment:

- Mr. Kyllonen stated prior to the issuance of the *Record of Employment*, while on medical leave mid-August 2012, he spoke with Blair Henderson ('Mr. Henderson'), Strata Council Member, about his return to work with HPL as part of the WCB Back Program, and Mr. Henderson told Mr. Kyllonen that he was not coming back to work at HPL;
- When Mr. Kyllonen contacted Ms. De Bischop to request a *Record of Employment* for a non-work related injury, Ms. De Bischop told Mr. Kyllonen if he submitted a resignation letter she would provide him with a *Record of Employment*, Mr. Kyllonen had said nothing about resigning his position with HPL;
- WCB contacted HPL to see if they would bring Mr. Kyllonen back to work and HPL refused to bring him back; and lastly
- Ms. De Bischop provided information that after Strata Plus withdrew its services, HPL did not want Mr. Kyllonen to come back to work for HPL, that Wayne Campbell ('Mr. Campbell'), as Strata Property Manager, brought Mr. Kyllonen back to work for HPL without the strata's consent. The only reason HPL signed the cheque partly making Mr. Kyllonen its employee again was because HPL knew he needed money.

129. In the circumstances, I find that HPL has failed to discharge the onus upon it to establish that the delegate erred in law in concluding that HPL terminated Mr. Kyllonen's employment.

ORDER

130. Pursuant to section 115 of the *Act*, I order the Determination, dated May 27, 2014, be confirmed in the amount of $8,671.58, together with any interest that has accrued pursuant to section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal