

An appeal

- by -

Tekmo Industrial Design Ltd. dba Budget Brake & Muffler
("Tekmo")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David B. Stevenson

FILE No.: 2002/616

DATE OF DECISION: March 11, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Tekmo Industrial Design Ltd. (“Tekmo”) of a Determination that was issued on November 18, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Tekmo had contravened Part 8, Section 63 of the Act in respect of the employment of Joseph Tarzwell (“Tarzwell”) and ordered Tekmo to cease contravening and to comply with the Act and Regulations and to pay an amount of \$3,885.73.

Tekmo says the Director misinterpreted Section 97 of the Act, and as a result erred in concluding Tekmo was liable to Tarzwell for length of service compensation.

Tekmo has requested an oral hearing, but the Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUE

The issue raised by this appeal is whether the Director erred in concluding Tekmo was liable to Tarzwell for length of service compensation.

FACTS

Tekmo operates a Budget Brake and Muffler shop. Tekmo had purchased the business and assets of the Budget Brake and Muffler shop from 428928 B.C. Ltd. The purchase was completed April 8, 2002.

Tarzwell was originally hired by 428928 B.C. Ltd. on May 3, 1993 as a motor vehicle mechanic. The Determination indicated that Tarzwell was given working notice of termination of employment by 428928 B.C. Ltd. prior to the completion of the purchase.

On April 3, 2002 Tarzwell was offered employment with Tekmo. He started working for Tekmo on April 8, 2002, earning \$15.00 an hour for a typical work week of 40 hours. He was laid off by Tekmo on June 15, 2002 and was paid two weeks’ wages in lieu of notice.

The Director decided that Tekmo was liable to pay Tarzwell compensation for length of service based on the length of his employment with both 428928 B.C. Ltd. and Teckmo. In reaching that decision, the Director referred to and applied Section 97 of the Act, which says:

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

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

The vendor, 428928 B.C. Ltd., gave working notice to Tarzwell, but the notice had no effect because the purchaser, Tekmo, employed Tarzwell with no interruption in his employment. If employees are employed by a purchaser and are subsequently terminated, the purchaser is responsible for compensation for length of service pay, or working notice, calculated from their original date of hire.

ARGUMENT AND ANALYSIS

Tekmo argues that the Director erred in interpreting and applying Section 97 of the *Act* to the circumstances of this case. Tekmo says the eight weeks' working notice of termination given to Tarzwell covered the requirement in the *Act* and the termination of his employment with 428928 B.C. Ltd. was confirmed by issuing Tarzwell a Record of Employment and paying out all wages owing up to date of termination - April 8, 2003.

Tarzwell has not filed any reply to the appeal. The reply of the Director asks that the Determination be confirmed.

A number of documents in the file, including the Determination and the appeal, make reference to Tarzwell having been given 'working notice' by 428928 B.C. Ltd., but nothing in the file indicates whether the 'working notice' was written notice or, if it was written notice, what its terms were. A request to the Director by the Tribunal to provide any documentation relating to the 'working notice' has gone unanswered. The form and content of the working notice is significant to the outcome of the appeal (see *Body Rays Tanning Centre Ltd.*, BC EST #D041/03).

The reasons in the Determination and the information on the file are insufficient to allow this appeal to be adjudicated. The matter must be referred back to the Director. It is anticipated that the Director will identify whether the 'working notice' given to Tarzwell was written notice and, if so, include a copy of it in the file.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated November 18, 2002 be referred back to the Director.

David B. Stevenson
Adjudicator
Employment Standards Tribunal