



An appeal

- by -

P.C. Bang Pacific Theatre Ltd.
(“PCBT”)

- 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: Carol L. Robert

FILE No.: 2012A/76

DATE OF DECISION: September 6, 2012

DECISION

SUBMISSIONS

Gordon Haddrell	on behalf of P.C. Bang Pacific Theatre Ltd.
Stephen McLaughlin	on his own behalf
Jill Adamson	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by P.C. Bang Pacific Theatre Ltd. (“PCBT”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued June 1, 2012.
2. On February 8, 2012, Stephen McLaughlin filed a complaint with the Director alleging that PCBT had contravened the *Act* in failing to pay him compensation for length of service.
3. Following an investigation, the Director’s delegate determined that PCBT had contravened Sections 58 and 63 of the *Act* in failing to pay Mr. McLaughlin annual vacation pay and compensation for length of service. The Director concluded that Mr. McLaughlin was entitled to wages and accrued interest in the total amount of \$4,090.69. The delegate also imposed two \$500 penalties on PCBT for the contraventions of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulation*, for a total amount payable of \$5,090.69.
4. PCBT contends that the delegate erred in law and failed to observe the principles of natural justice in making the Determination.
5. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 8 of the Tribunal’s *Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUES

6. Whether or not the Director erred in law in finding that Mr. McLaughlin’s employment was continuous under section 97 of the *Act* and that his employment was terminated; and whether or not the Director failed to observe the principles of natural justice in making the Determination.

FACTS

7. Mr. McLaughlin worked from home as a software developer for P.C. Bang Ltd. (“Bang”), a company that operated a local area network (LAN) business. Mr. McLaughlin began working for Bang on March 13, 2006, under the direction of Gordon Haddrell, Bang’s sole director. Bang ceased retail operations in 2008 and continued as a software developer and trademark holding company under the name P.C. Development Company Ltd., of which Mr. Haddrell was also a director. Mr. McLaughlin worked for P.C. Development Company Ltd. in its retail operations.

8. PCBT was established in 2010 with Mr. Haddrell and Brendan Pickering as directors. It commenced retail operations in 2011 at which time Mr. McLaughlin was verbally advised that his work with Bang was ending and that he could either vacate the premises immediately or begin working for PCBT under Mr. Haddrell and Mr. Pickering's direction. Mr. McLaughlin did not receive a written notice of termination from Bang and went to work for PCBT. Mr. Haddrell contended that Mr. McLaughlin voluntarily quit his employment with Bang in July 2011 in order to continue to work with PCBT. Although Mr. McLaughlin was required to work out of an office during set hours and received a salary increase, he worked on the same software development he had worked on for Bang. Mr. McLaughlin advised the delegate that he helped install and configure the servers at the new location, helped install computer networking cable, and assisted in assessing the new location and layout of the new store.
9. Mr. Haddrell asserted that section 97 of the *Act* did not apply because there were no sale of assets or transfer of business between Bang and PCBT and because he was the sole director and shareholder of Bang and only one of two directors and shareholders of PCBT. Mr. Haddrell further contended that prior to July 12, 2011, Bang did not have any physical presence and that Mr. McLaughlin was an "on-site liaison" to ensure the software he developed was working as intended. Mr. Haddrell further asserted that any equipment Bang left in the space occupied by PCBT after July 12, 2011, was only there temporarily.
10. On January 10, 2012, Mr. Haddrell told Mr. McLaughlin that PCBT's assets were going to be seized, and asked him to back up the servers. The landlord subsequently locked the employees out of the building. Mr. Haddrell asked Mr. McLaughlin to continue working another week from home to produce documentation in support of his software development. On January 16, 2012, Mr. McLaughlin went to Mr. Haddrell's home to collect his paycheque and to inquire into the status of his work. Mr. Haddrell advised him that he did not have a cheque ready and asked him to return the following day. On January 19, 2012, Mr. Haddrell told Mr. McLaughlin that his cheque would be ready the following Monday and that he needed him to work for another week out of his home to complete some documents. Mr. McLaughlin received his final paycheque on January 23, 2012, but refused to work out of his own home because he would have had to use his own equipment and because he felt he had been laid off. Mr. McLaughlin received a final paycheque for 50 hours of work for the pay period ending January 10, 2011, and for 38.5 hours of "prepaid final work week". Mr. McLaughlin also received two Records of Employment (ROE's), one from Bang showing a first day worked as March 15, 2006, and the last day July 11, 2011. The ROE indicated "other" as a reason for issuance, with the following additional comments: "transfer to indirectly related corporation for same position". The second ROE was issued by PCBT showing the first date worked as July 12, 2011, and the last day worked January 10, 2012. Both ROE's were signed by Mr. Haddrell.
11. Mr. Haddrell argued that Mr. McLaughlin quit his position with PCBT when he refused to work an additional week as requested. Mr. Haddrell agreed that PCBT's office closed on January 10, 2012, and that he had a discussion with Mr. McLaughlin about continuing to work for an additional week on January 24, 2012, based on the dates on the ROE's. Mr. Haddrell argued that the written notation "pre-paid final work week" constituted written notice of termination of employment.
12. Mr. Haddrell provided the delegate with three emails he sent to Mr. McLaughlin in February 2012 asking him about work Mr. McLaughlin was to complete. Mr. Haddrell asserted that these emails demonstrated that Mr. McLaughlin continued to work after receiving his notice of termination.
13. At issue before the Director's delegate was whether or not Mr. McLaughlin was owed compensation for length of service, and if so, in what amount.

14. The delegate analyzed whether or not section 97 applied to Mr. McLaughlin's employment on July 11, 2011. She concluded that, whatever the arrangements between Bang and PCBT, Mr. McLaughlin used Bang's software on PCBT's behalf on July 12, 2011, and for some months afterwards. She found the term "dispose" to be broad enough to encompass the transfer of any assets from one company to another by any means and concluded that Bang had "disposed" of its assets to PCBT.
15. The delegate noted that there was no dispute that Mr. McLaughlin had not been given written notice of termination when the assets were disposed of. She found that, as of July 12, 2011, Mr. McLaughlin worked at the same office, on the same equipment and on the same software development project as he had been the day before. The delegate determined that Mr. McLaughlin's employment was continuous and uninterrupted through the change from Bang to PCBT. She concluded that section 97 was triggered by the fact that Mr. McLaughlin was an employee of Bang when part of its assets were disposed of to PCBT and that for the purposes of the *Act*, Mr. McLaughlin's employment was deemed to be continuous and uninterrupted by the disposition.
16. Finally, the delegate noted that the parties agree that PCBT was shut down after the company assets were seized and doors locked on January 10, 2012. She found that, despite the parties' differing recollection of the precise date they discussed the possibility of Mr. McLaughlin performing additional work, they did not dispute that there was a break in his employment from at least January 10, 2012, until January 19, 2012. The delegate found that PCBT had not met the requirements for a layoff. She determined that Mr. McLaughlin was not able to work after January 10, 2012, and was not asked to return to work until at least 9 days later, so he was terminated. She concluded that PCBT had not met the requirements of section 63 of the *Act* and had failed to pay termination pay in accordance with the *Act*.

ARGUMENT AND ANALYSIS

17. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination; or
 - (c) evidence has become available that was not available at the time the determination was being made
18. A disagreement with the result, in and of itself, is not a ground of appeal. An appellant must show clear and convincing reasons why the Tribunal should interfere with the delegate's decision on one of the three stated grounds of appeal.

Error of Law

19. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
 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 be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle

Section 97

20. The employer contends that the delegate erred in her conclusion that there was a disposition of the assets of the business. He argues that Bang and PCBT have no “direct connection” despite the similar names. He submits that:

Section 97 of the *Act* requires either “all or a part of a business” or “a substantial part of the entire assets of a business be disposed of”. The delegate’s opinion is that “substantial part” can be construed as meaning “any assets” which is not written into the law nor is it supported by any Policy Interpretation.

21. Mr. Haddrell argues that although Bang loaned some computer equipment to PCBT, it retained ownership, and this arrangement does not constitute a disposal.

22. The delegate submits that the definition of “dispose” in the *Interpretation Act* allows for a broad interpretation and includes a transfer of assets by any method, including a loan. She notes that in *Artech* (BC EST # D147/04) the Tribunal upheld a similar interpretation, where one entity left equipment behind for use by another. She further notes that Mr. McLaughlin developed software for Bang, and continued to work on that software, a substantive asset, after the date of disposition. In reply, the Employer submits that the Director erred in her interpretation of the *Artech* decision.

23. Mr. McLaughlin submits that Mr. Haddrell’s arguments are simply a re-statement of his original position and has provided no new facts or information, and that his appeal should be dismissed because it is frivolous or vexatious.

24. The Tribunal has dealt with and disposed of arguments similar to Mr. Haddrell’s on many occasions. In *Mitchell* (BC EST # D107/97, a reconsideration of BC EST # D314/97) the Tribunal held as follows:

We note that the language of section 97 is broad in scope. 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. Section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 defines “dispose” as follows:

“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;

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.

25. I find no error in the delegate’s conclusion that Bang disposed of its assets to PCBT. Even if Bang loaned equipment to PCBT as claimed by Mr. Haddrell, I find that the loan of equipment for a several month period is included within the definition of “dispose”. Furthermore, as Mr. McLaughlin continued to work on the same software as he had previously, I infer that this software, which was an integral part of the business, was also “disposed of”.

26. Mr. Haddrell also argues that the Director erred in law in concluding that Mr. McLaughlin’s employment was continuous:

Continuous employment has a very clear set of rules under which an employee qualifies for the protection it provides, and similar employment between two companies does not reach that requirement.

27. In *Mitchell*, the Tribunal stated as follows:

In our view, the plain meaning of section 97 is that where there is a disposition of a business, section 97 deems employment to be continuous and uninterrupted for the purposes of the *Act*. If an employee is not terminated by the vendor employer prior to or at the time of the disposition, then for the purposes of the *Act*, the employment of the employee is deemed to be continuous. To borrow the words of the original panel: "... the employment relationship merely continues with the asset purchaser being, in effect, substituted for the asset vendor as the employer of record." (at page 6)

The deeming of employment to be continuous and uninterrupted is triggered by the fact of the disposition, not by the decision of an employee to continue employment with the purchaser employer.

28. I find no error of law in the delegate's conclusion in this respect. Given that Bang disposed of its assets and Mr. McLaughlin's employment was not terminated, his employment is deemed to be continuous.

Section 63

29. Mr. Haddrell also argues that the reason there was a disagreement about when Mr. McLaughlin was laid off is because he was given significant latitude in working from home. He submits:

The employee was expected to be working from home in mid-January and was paid for work done from his home in his final paycheque. But, without notice, the employee then opted to cease working from his home and in effect created the conditions required to end his employment. It was the employer's belief that the employee was in fact working from his residence during this "week of layoff". When the employer learned that the employee was not working from home, the employer then requested the employee to continue working from home as he had done prior.

The delegate does not explain how she can support an employee who in effect laid himself off.

30. Mr. Haddrell further asserts that because Mr. McLaughlin continued to access company servers after mid-January, he did not believe he had been laid off.

31. Finally, Mr. Haddrell argues that the computers used for the development of software were seized unlawfully and this action was the cause of the interruption of Mr. McLaughlin's duties and this was an action the employer could not have anticipated. He argues that because the Landlord acted illegally, section 63 did not apply.

32. The delegate notes that even though Mr. Haddrell argues that he gave Mr. McLaughlin written notice of termination by writing on his paystub "prepaid final work week", the cheque was not given to Mr. McLaughlin until January 24, 2012. She also notes that Mr. Haddrell asserts that Mr. McLaughlin continued to work for PCBT after that date, even though this work would have been performed after his "prepaid final work week" would have ended.

33. Section 63 of the *Act* creates a liability for employers to pay compensation to employees based on the length of their employment. Section 63(3) states that this liability is deemed to be discharged if an employee is given written notice of termination or if the employee resigns, retires or is "...dismissed for just cause." Section 65 provides for certain exceptions to the employer's obligations.

34. There is no evidence Mr. McLaughlin was given a written notice of termination or that he was dismissed for cause. Mr. Haddrell's hand written notation on a paystub stating "prepaid final work week" does not constitute sufficient notice. There was no evidence, and PCBT did not assert before the delegate, that

Mr. McLaughlin was laid off. In any event, I find no error in the delegate's conclusion that PCBT had not met the requirements for a layoff.

35. There is also no evidence Mr. McLaughlin resigned. The fact was that Mr. McLaughlin was unable to work at his workplace because the doors had been locked. Mr. Haddrell advances contradictory arguments, contending on the one hand that Mr. McLaughlin quit his employment on or about January 23, 2012, even though the ROE indicated his last day of work was January 10, 2012, and on the other hand, contending that Mr. McLaughlin continued to work for PCBT into February. I find no basis to conclude that the delegate erred in law in her conclusions.
36. As I understand Mr. Haddrell's argument, once the Landlord locked the doors, Section 63 of the *Act* did not apply because Mr. McLaughlin was "employed under an employment contract that became impossible to perform" due to an unforeseeable event or circumstance other than receivership or insolvency (s. 65 (1)(d)). As the Tribunal noted in *M.J.M. Conference Communications of Canada Corp.* (BC EST # D182/04) the Tribunal has given a narrow interpretation to the s. 65 exceptions. Specifically, the Tribunal has held that s. 65(1)(d) does not include situations where a contract of employment was unable to be performed because a landlord shut down an employer's business by executing a distress warrant (*MacDonald & Wilson Ltd.* (BC EST # D497/97) or where an employer shut down after being evicted from its premises because "an eviction caused by a failure to reach an agreement on a lease or a dispute over rent is largely foreseeable." (*Top Win Cafe Ltd.* (BC EST # D629/01).
37. I conclude that PCBT has not demonstrated an error of law and dismiss the appeal on this ground.

Natural Justice

38. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.
39. There is no evidence, and Mr. Haddrell made no submissions on this ground of appeal. Having reviewed the record, I find no basis for PCBT's allegations that the Director failed to comply with the principles of natural justice and dismiss the appeal on this ground.

ORDER

40. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated June 1, 2012, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal