



An appeal

- by -

Desert City Holdings Ltd. Operating as Central Plaza Town Pantry
(“Desert City”)

- 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.: 2000/721

DATE OF HEARING: February 9, 2001

DATE OF DECISION: March 5, 2001

DECISION

APPEARANCES:

| | |
|--|-----------------------------------|
| on behalf of Desert City Holdings Ltd. | Mark Konowalchuk |
| | Wendy Konowalchuk |
| on behalf of the individuals | Roderick Herd (on his own behalf) |
| on behalf of the Director | No one appearing |

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Desert City Holdings Ltd. operating as Central Plaza Town Pantry (“Desert City”) of a Determination that was issued on September 26, 2000 by a delegate of the Director of Employment Standards (the “Director”). The Determination, applying Section 97 of the *Act*, concluded that Desert City had contravened Part 8, Sections 63 and 68 of the *Act* in respect of the employment of Roderick Herd (“Herd”) and Dianna Higginson (“Higginson”) and ordered Desert City to cease contravening and to comply with the *Act* and to pay an amount of \$3,850.58.

Desert City says the Determination is wrong because the Director misapplied Section 97 to the facts and the persons who should be held responsible to Herd and Higginson for liabilities under the *Act* are Prince George Waterbed Warehouse Ltd. operating as Central Plaza Town Pantry and Ralph Sather, a Director/Officer of Prince George Waterbed Warehouse Ltd. operating as Central Plaza Town Pantry.

ISSUE

The issue in this appeal is whether the Director has correctly interpreted and applied Section 97 of the *Act* to the facts of this case.

THE FACTS

On December 15, 1999, the Director issued two Determinations, one against Prince George Waterbed Warehouse Ltd. operating as Central Plaza Town Pantry (the “Corporate Determination”) and the other against Ralph Sather, a Director/Officer of Prince George Waterbed Warehouse Ltd. operating as Central Plaza Town Pantry (the “Director/Officer

Determination”) in respect of complaints by Herd and Higginson that they had been terminated from their employment with Prince George Waterbed Warehouse Ltd. operating as Central Plaza Town Pantry without notice and without cause. The Corporate Determination concluded both were entitled to length of service compensation and the Director/Officer Determination concluded Ralph Sather was liable under Section 96 of the *Act* as a Director/Officer of Prince George Waterbed Warehouse Ltd. operating as Central Plaza Town Pantry. These Determinations were appealed, and on March 14, 2000, the Tribunal held a hearing on the appeal. At that hearing, Mr. Sather, appearing on his own behalf and for Prince George Waterbed Warehouse Ltd. operating as Central Plaza Town Pantry, raised a preliminary issue, described in the decision as follows:

During the opening of the hearing, Ralph Sather, who is the principal of Prince George Waterbed Warehouse Ltd. operating as Central Plaza Town Pantry advised the panel that he had disposed of the business which employed Herd in August, 1999, some 4 ½ months prior to the issuance of the Determination.

The preliminary issue to be decided in this appeal is therefore whether the Determination has correctly identified Town Pantry as the party who might be liable for the compensation for length of service to Herd and Higginson.

After a brief analysis of the available material, the adjudicator in the original decision decided there was not sufficient evidence to indicate whether the Director had named the proper person in the Determination and referred the matter back to the Director for further investigation. No conclusion was reached on the merits of the appeal.

The Director re-investigated and issued the Determination under appeal in this decision. The Determination sets out the following background information:

Desert City Holdings Ltd. operating as Central Plaza Town Pantry is a gas station/convenience store and is under the jurisdiction of the *Act*. Roderick Herd worked from September 1, 1987 to July 31, 1998 as a cashier at the rate of \$9.00/hr. Dianna Higginson worked from August 21, 1997 to August 3, 1998 as a gas pump attendant at the rate of \$7.50/hr.

...

In late August, 1999, the ownership of Central Plaza Town Pantry was transferred from Prince George Waterbed Warehouse Ltd. to Desert City Holdings Ltd. The sale of the Central Plaza Town Pantry by Prince George Waterbed Warehouse Ltd. to Desert City Holdings Ltd. resulted in the transfer of assets and liabilities to the purchasing employer. This Determination is being issued to Desert City Holdings Ltd. as a successor to Prince George Waterbed Warehouse Ltd. and the entity liable if it is determined that wages are owed to the complainants.

Neither Herd nor Higginson were employed by Desert City following August, 1999 when Desert City assumed the operation of the Central Plaza Town Pantry.

ARGUMENT AND ANALYSIS

As I advised the parties at the hearing of this appeal, the Determination must be cancelled.

In *Re Murray Lerner operating as St. Louis Grill*, BC EST #D299/00, the Tribunal made the following statement concerning the application of Section 97 of the *Act*:

. . . if, as here, an employee is neither employed by the vendor purchaser at the time the business is disposed of nor continues to work for the purchaser, there is no rationale basis for deeming that employment to be continuous and uninterrupted.

I also apply the following statement of a panel of the Tribunal in the reconsideration decision of *Re Lari Mitchell and others*, BC EST #D107/98 (Reconsideration of BC EST #D314/97):

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 disposition, then for the purposes of the *Act*, the employment of the employees is deemed to be continuous . . .

Finally, in *Re Teamwork Property Solutions Ltd.*, BC EST #D434/98, the Tribunal stated:

The operation of Section 97 is contingent upon two findings of fact: one, that there is a disposition of a business; and two, that there is employment with the “vendor” employer as of the date of the disposition.

On the facts of this case, the termination of employment of both Herd and Higginson occurred more than a year before any “disposition” was alleged to have occurred. As well, neither Herd nor Higginson were ever employed by Desert City, the putative “purchasing” employer. In such circumstances, Section 97 of the *Act* does not operate to make Desert City responsible for the liability arising under Section 63 of the *Act* to Herd and Higginson.

It is unclear from the material on file of the status of the Determinations issued on December 15, 1998 against Prince George Waterbed Warehouse Ltd. operating as Central Plaza Town Pantry and Ralph Sather, a Director/Officer of Prince George Waterbed Warehouse Ltd. operating as Central Plaza Town Pantry. The Director should, in my respectful opinion, revisit those Determinations. If those Determinations have not been cancelled, the Tribunal should be advised that the appeals of Prince George Waterbed Warehouse Ltd. operating as Central Plaza Town Pantry (the “Corporate Determination”) and Ralph Sather, a Director/Officer of Prince

George Waterbed Warehouse Ltd. operating as Central Plaza Town Pantry remain outstanding and should be addressed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated September 26, 2000 be cancelled.

DAVID B. STEVENSON

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