

An appeal

- by -

M3 Personnel Group Inc.
(“M3 Personnel”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2016A/71

DATE OF DECISION: October 13, 2016

DECISION

SUBMISSIONS

David Dahlgren	counsel for M3 Personnel Group Inc.
Lisa Bowers	on her own behalf
Owen Francis	on his own behalf
Debbie Kirilo	on her own behalf
Alan Moscovitch	on his own behalf
Toni Mudry	on her own behalf
Maria Mudry	on her own behalf
Dawn Rowan	on behalf of the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed by M3 Personnel Group Inc. (“M3 Personnel”) under subsections 112(1)(a) and (b) of the *Employment Standards Act* (the “*Act*”) and it concerns a Determination issued against it by a delegate of the Director of Employment Standards (the “delegate”) on May 13, 2016. The delegate also issued her “Reasons for the Determination” (the “delegate’s reasons”) concurrently with the Determination.
2. By way of the Determination, M3 Personnel was ordered to pay the total sum of \$45,130.37 on account of unpaid wages and interest owed to 16 individuals. The largest component of the unpaid wage award (\$21,682.47) is for regular wages (see section 18 of the *Act*) and the next largest component is for compensation for length of service payable under section 63 (\$17,417.91). The total unpaid wage award also includes statutory holiday pay (section 45; \$355.46), vacation pay (section 58; \$2,505.65) and section 88 interest. I should note that M3 Personnel takes no issue with the delegate’s unpaid wage calculations; its challenge solely concerns whether it has any legal liability under section 97 of the *Act* for these unpaid wages.
3. Further, and also by way of the Determination, M3 Personnel was ordered to pay an additional \$1,000 on account of two separate \$500 monetary penalties that were levied against M3 Personnel based on its contraventions of sections 17 (regular payment of wages) and 63 (failure to pay compensation for length of service) of the *Act*. Accordingly, the total amount payable under the Determination is \$46,130.37.
4. M3 Personnel, through its legal counsel, also applied for a suspension of the Determination under section 113 of the *Act*. By letter dated June 17, 2016, the Tribunal’s Appeals Manager advised M3 Personnel that since the Director agreed not to undertake any enforcement proceedings regarding the Determination until the appeal process was concluded, the Tribunal did not find it necessary to issue a section 113 order.
5. M3 Personnel appeals the Determination on the grounds that the delegate erred in law (subsection 112(1)(a)) and failed to observe the principles of natural justice in making the Determination (subsection 112(1)(b)). The central thrust of M3 Personnel’s appeal concerns the delegate’s declaration that M3 Personnel was a

“successor” firm to Mayday Cleaning Services Inc. (“Mayday Cleaning”) in accordance with section 97 of the *Act*:

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.

6. Briefly, M3 Personnel’s position is that Mayday Cleaning was “insolvent” as of July 24, 2015, and that as of this date Mayday Cleaning terminated the employment of each complainant. M3 Personnel says that it did not hire any of the complainants until July 27, 2015, and that M3 Personnel “did not take over [Mayday Cleaning’s] former office or assets”. M3 Personnel submits that there was no factual basis for the issuance of a section 97 declaration in this instance and, that being the case, the Determination should be cancelled.
7. As noted above, M3 Personnel also relies on the “natural justice” ground of appeal. This ground is not explicated with any particularity in M3 Personnel’s legal counsel’s “factum” that was appended to the Appeal Form (nor in counsel’s “reply factum”) but it appears to be grounded, first, in an assertion that the delegate’s investigation was incomplete resulting in evidence that was “vague, inconsistent, cursory and unreliable” with respect to certain key matters and, second, that since there was no oral complaint hearing, M3 Personnel was never afforded an opportunity to challenge certain important witnesses through cross-examination.
8. I more fully address M3 Personnel’s reasons for appeal, and also the respondent employees’ and the delegate’s arguments, below. At this juncture, I will summarize the evidence before the delegate and her findings.

BACKGROUND FACTS

9. Thirteen of the sixteen individuals who were awarded wages under the Determination originally filed unpaid wage complaints under section 74 of the *Act*. I understand that these thirteen complaints were filed during the period from August 20 to October 30, 2015 (delegate’s reasons, page R4). During the course of the delegate’s investigation, three other individuals were identified and these three persons were also awarded wages under the Determination. The following circumstances were set out in the delegate’s reasons.
10. Mayday Cleaning “operated a cleaning company that offered construction and renovation cleaning, fire and flood clean up, home and estate maintenance, and marble, slate, granite, limestone, tile and hardwood floor cleaning” (delegate’s reasons, page R2). Ms. Marlene E. Dube (“Dube”) was, at all material times, Mayday Cleaning’s sole director and officer.
11. M3 Personnel operates a temporary staffing agency for clients primarily in the construction, industrial and manufacturing sectors. M3 Personnel’s legal counsel asserts that this firm and Mayday Cleaning “were not at any time related or associated companies with similar directors, officers, managers or shareholders” and this assertion is not in dispute but, at the same time, it should be noted that the effect of the section 97 declaration is to hold M3 Personnel liable as a “successor firm”. The delegate never issued a section 95 “common employer” declaration.
12. The delegate’s reasons refer to a third business corporation – 1022245 B.C. Ltd. (the “Numbered Company”) – that does share at least three, and possibly four, common directors with M3 Personnel. Mr. Kobie John Brandt (“Brandt”) is a director of the Numbered Company but was not listed in the B.C. Corporate Registry, as of August 31, 2015, as being a director or officer of M3 Personnel. However, Mr. Brandt apparently advised the delegate during the course of her investigation that he was “a shareholder and director” of M3

Personnel (record, page 124). Mr. Brandt also represented the latter firm at a July 28, 2015, meeting held at Mayday Cleaning's offices at which time Mayday Cleaning employees signed various documents to put them on M3 Personnel's payroll. M3 Personnel's legal counsel apparently advised the delegate during the course of her investigation that the Numbered Company "was most likely a shell corporation created to acquire the assets of [Mayday Cleaning]" (delegate's reasons, page R3).

13. "During 2015 [Mayday Cleaning] experienced financial difficulties and was attempting to sell the company. A buyer was found but despite the pending sale, on or around June 27, 2015, [the] Canada Revenue Agency (CRA) seized [Mayday Cleaning's] bank accounts, receivables and assets. Although [Mayday Cleaning] could no longer meet its payroll, the business continued as usual with [Mayday Cleaning] paying some cash to its employees through its business contracts" (delegate's reasons, page R3). Mayday Cleaning's principal, Ms. Dube, filed for personal bankruptcy and advised the delegate of this fact on September 29, 2015 (delegate's reasons, page R4).

14. The details relating to the asset sale, as recounted in the delegate's reasons at page R3, are as follows:

On July 28, 2015, an Asset Purchase Agreement (the "APA") between [Mayday Cleaning] (the "Seller"), 1022245 B.C. Ltd. (the "Buyer") and Marlene Dube (the "Covenantor") was signed by Marlene Dube and an authorized signatory for 1022245. In the agreement it states that the sale will be completed on July 28, 2015 or such other date that the parties may agree. Further, it states that the Buyer may purchase the Assets at their liquidation value provided that the purchase price is paid by the Buyer to the Receiver General for Canada. The agreed upon purchase price was \$10,000.00 for intangible assets and \$15,300.00 for tangible assets. The total purchase price of \$25,300.00 was paid by the Buyer and placed in Trust with its solicitor pending the completion of the sale. The Agreement contained a clause wherein the Seller would terminate the employment of all the employees of the Seller immediately prior to "Closing" and be liable to the employees for all wages remaining owing, benefits and severance pay accrued to the Closing date.

15. The proposed sale never completed (delegate's reasons, page R10). Although the proposed asset sale never completed, "[on] July 28, 2015, in anticipation of the sale, Mr. Brandt, on behalf of [M3 Personnel], had a meeting with the Complainants where they were required to fill out hiring packages including providing information in order to put the Complainants' *sic* on [M3 Personnel's] payroll. [M3 Personnel] subsequently paid the Complainants for work they performed as of July 25, 2015. [M3 Personnel] took over responsibility for paying wages to the Complainants and changed the payment schedule from bi-weekly to daily pay" (delegate's reasons, page R3).

16. In and around the time that the asset sale was pending, the Teamsters Union, Local 213, was undertaking an organizing drive and on July 30, 2015, a notice was posted at Mayday Cleaning's offices advising that a certification application had been filed and that a representation vote would be held on August 6, 2015. The union "was certified as the bargaining unit *sic*, "agent"?) for the employees of [Mayday Cleaning], except for office staff, on August 6, 2015 [however] the business stopped operating that same day by closing time in the afternoon [and] "no collective agreement was negotiated" (delegate's reasons, page R4).

17. The delegate summarized the complainants' evidence as follows (page R6):

The Complainants all agree that they worked continuously and uninterrupted until 5:00 PM August 6, 2015 when [Mayday Cleaning] officially closed for business...While [the complainants'] start dates vary between February, 1998 and July 2015, they all state that [Mayday Cleaning] has ceased operations and agree that they are owed wages for work performed between June 26, 2015 and July 24, 2015. Their complaints include unpaid regular wages, overtime wages, statutory holiday pay, vacation pay and compensation for length of service. Some of the Complainants provided a detailed record of unpaid

hours worked and wage statements showing wages earned to assist in the calculation of regular wages, vacation pay and overtime owed. Most of the Complainants submitted ROEs [records of employment] from [Mayday Cleaning] dated July 24, 2015. However, they generally state the amounts shown therein are incorrect.

18. In her reasons, the delegate summarized the evidence of two specific complainants and provided a general summary of the other complainants' evidence. The delegate noted (page R6): "All Complainants who filed complaints supplied wage statements from [M3 Personnel] showing hours worked specifically for [Mayday Cleaning]. The wage statements show that the Complainants were working on [Mayday Cleaning] cleaning contracts and were being paid by [M3 Personnel] for those hours worked on a daily basis."
19. As noted above, the delegate specifically summarized the evidence of two named complainants. Ms. Toni Mudry maintains that she was employed by Mayday Cleaning until July 26, 2015, and then by both that firm and M3 Personnel, and that on July 28, 2015 – backdated to July 24, 2015 – Mayday Cleaning gave her an ROE. She says that her last day of work was August 6, 2015, when "[Mayday Cleaning] shut down operations" (page R5). The other complainant, Ms. Lisa Bowers, says she worked past her ROE layoff date of July 24, 2015, for "[Mayday Cleaning] contracts and for [Mayday Cleaning] clients" (pages R5 – R6).
20. The delegate summarized M3 Personnel's position at pages R6 – R7 of her reasons:

...[M3 Personnel] submitted that it did not, at any time, purchase or acquire any or all of the business or assets of [Mayday Cleaning] and therefore is not liable to pay overtime, statutory holiday pay, vacation pay or compensation for length of service to the Complainants as per their allegations.

[M3 Personnel] states that it was [the Numbered Company] who entered into the APA to purchase the assets of [Mayday Cleaning] on July 28, 2015 and that [M3 Personnel] was not party to the agreement. However, the Complainants were placed on [M3 Personnel's] payroll effective July 25, 2015 in anticipation of the sale between [the Numbered Company] and [Mayday Cleaning]. [M3 Personnel] submitted payroll summaries for the Complainants which confirm that [M3 Personnel] paid wages for hours worked from July 25, 2015 onwards.

The APA required [Mayday Cleaning] to remain liable to the employees in respect of all wages accrued and payable up to the Closing Date and terminate all employees immediately prior to such; the Closing Date was set out as 'July 28, 2015 or such other date that the parties may agree'. [M3 Personnel] asserts that all employees were terminated on July 24, 2015 and submitted, as proof, an email dated July 24, 2015 from Ms. Dube to Mr. Brandt...In addition, [M3 Personnel] attests that the termination is corroborated by several of the Complainants who state in their complaint forms that they stopped working for [Mayday Cleaning] on July 24, 2015. "
21. The delegate summarized Ms. Dube's evidence at pages R7 – R8 in her reasons. Ms. Dube established Mayday Cleaning in 1993 but by 2012 the business was in difficult financial circumstances apparently attributable to the fraudulent activity of one of her employees resulting in \$133,000 liability to the CRA. Ms. Dube entered into discussions with Mr. Brandt regarding a possible asset sale, and that as far as she was concerned, M3 Personnel and the Numbered Company "were interchangeable". The asset purchase agreement was executed on July 28, 2015, by which time Mayday Cleaning's employees had not been paid their full wages for about five weeks. Ms. Dube apparently asked M3 Personnel to pay the employees' back wages but the latter refused to do so, although the asset sale completion date was extended to August 15, 2015.
22. Ms. Dube says that on July 28, 2015, at about 3:00 PM, and at Mayday Cleaning's business offices, Mayday Cleaning employees "filled out hiring packages and signed on as employees of [M3 Personnel]" and that although she "issued ROEs to the employees dated July 24, 2015...she never gave formal written notice of

termination to the employees because they were to keep working during the transition to [M3 Personnel]”. “Ms. Dube clarified that the [Mayday Cleaning] client contracts kept going through to August 6, 2015 and that the employees would be dispatched from the [Mayday Cleaning] office and would pick up their cheques from [M3 Personnel’s] office in Vancouver.”

23. With respect to the union organizing drive, Ms. Dube maintains that she warned the staff that if the drive succeeded, [M3 Personnel] “would back out of the sale” and that this, in fact, is what eventually transpired. Ms. Dube stated that “[Mayday Cleaning] employees were offered continued employment with [M3 Personnel] after she closed the business on August 6, 2015 but does not know why they chose not to work for them.”

THE DETERMINATION

24. The central issue before the delegate is set as follows at pages R4 – R5 of the delegate’s reasons: “The parties agree that “[M3 Personnel] paid the Complainants all wages earned from July 25 to August 6, 2015 including vacation pay on those earnings, but excluding compensation for length of service. However, [M3 Personnel] disagrees that is [sic] was the Employer of any of the Complainants and in turn disputes any liability to pay outstanding wages earned prior to July 25, 2015 and compensation for length of service”.

25. The delegate acknowledged that the asset sale never completed but nonetheless held that M3 Personnel was a section 97 “successor” to Mayday Cleaning. The delegate held (page R10): “I am satisfied that it is reasonable to conclude that [M3 Personnel] took possession of [Mayday Cleaning] client contracts and took over paying [Mayday Cleaning] employees” and that “[M3 Personnel] provided no evidence to refute that it billed and collected revenue from the customers for whom the Complainants performed work”. “Regardless of the fact that the sale did not complete, I find that [M3 Personnel’s] action of taking over [Mayday Cleaning’s] customers and employees as of July 25, 2015 constituted the disposal of a substantial part of the assets of the business from [Mayday Cleaning] to [M3 Personnel].” The delegate’s analysis of the section 97 issue continued (at page R10):

The Complainants received ROEs from [Mayday Cleaning] dated July 24, 2015 [for shortage of work]...As evidenced by the Complainants, they continued to work on [Mayday Cleaning] contracts after July 24, 2015 and several Complainants continued to work and did not receive their ROE until July 28, 2015 at the meeting with Mr. Brandt held at the [Mayday Cleaning] office. It is apparent that Ms. Dube issued the ROEs to fulfil the terms of the APA in regards to terminating the [Mayday Cleaning] employees. However, Ms. Dube stated she did not notify the employees they were being terminated on or before July 24, 2015. The Complainants’ [sic] state that they were never advised, neither that they were being terminated, nor that there would be a change of Employer, until they were issued the ROEs. Issuance of an ROE does not constitute a termination for the purposes of the Act.

26. The delegate then concluded that “[Mayday Cleaning] did not terminate the employment of any of the Complainants” and “[a]ccordingly, I find the Complainants were employed as of the date of the disposition triggering section 97 of the Act” (page R10). “As such, I find the Complainants’ employment was continuous and uninterrupted by the disposition of the business”. The delegate held that “[M3 Personnel] is liable for the wages that are owed to the Complainants for the pay periods from June 26 to July 24, 2015 and is also liable to pay the Complainants compensation for length of service based on their length of employment from their date of hire with [Mayday Cleaning]” (page R10).

27. Although the delegate held that the complainants’ employment with Mayday Cleaning was never terminated prior to the “disposition” of Mayday Cleaning’s service contracts from Mayday Cleaning to M3 Personnel, she also held that M3 Personnel subsequently terminated the complainants’ employment on August 6, 2015,

thereby triggering an obligation on M3 Personnel's part to pay compensation for length of service based on the individual complainant's date of hire by Mayday Cleaning (page R11):

[M3 Personnel] provided payroll records for the Complainants for the period they took over paying their wages from July 25, 2015 – August 6, 2015. The Complainants corroborate the allegations and wages have been calculated according to the Act. No wages have been found owing from the period of July 25, 2015 to August 6, 2015 as evidenced by [M3 Personnel's] payroll records and consensus from the Complainants aside from compensation for length of service.

...

... The Complainants were terminated on August 6, 2015 without advance written notice and have not been paid compensation for length of service. Accordingly, I find that eligible Complainants are owed compensation for length of service with the amount being indicated on their respective calculation sheets.

THE PARTIES' POSITIONS

28. M3 Personnel's appeal is based on two grounds: first, it says that the delegate erred in law in issuing the section 97 declaration; second, it says that the delegate failed to observe the principles of natural justice in making the Determination. I will address each issue in turn.

Error in Law

29. M3 Personnel says that Mayday Cleaning was "insolvent" as of July 24, 2015, and that about one month prior, on June 27, 2015, the CRA seized Mayday Cleaning's bank accounts and other financial assets. The immediate effect of CRA seizure was that Mayday Cleaning was no longer able to meet its payroll obligations. Ms. Dube told the delegate that when the asset sale agreement was executed (July 28, 2015), the "staff had not been paid for 5 weeks" (page R7). M3 Personnel paid the complainants for work undertaken during the period from July 25, 2015, to August 6, 2015.
30. M3 Personnel says that it formally placed the complainants on its payroll as of July 28, 2015, when it had them "fill out hiring packages and sign on as employees of M3 Personnel". M3 Personnel also says that it did not take over any of Mayday Cleaning's tangible assets nor did it occupy that firm's former offices. M3 Personnel says that after the complainants were terminated by Mayday Cleaning, they "reported directly to M3 Personnel's office for their job assignments" and "were dispatched to work directly from M3 Personnel's office".
31. M3 Personnel says that Mayday Cleaning terminated all of the complainants on or before July 24, 2015. M3 Personnel says that there was no proper evidentiary basis for the delegate's factual finding that there was no break in the complainants' employment (*i.e.*, that the complainants' employment was continuous and uninterrupted). Accordingly, M3 Personnel submits that the delegate erred in law. More particularly, M3 Personnel says that it cannot be a section 97 successor employer simply because it subsequently hired former Mayday Cleaning employees and provided services to former Mayday Cleaning clients.
32. Six of the respondent employees filed submissions in this appeal. For the most part, these submissions do not directly address the section 97 issue. However, Ms. Kirilo says that she was never formally terminated by Mayday Cleaning and that she was, for an interim period, employed by both Mayday Cleaning and M3 Personnel. Mr. Moscovitch says that although he received a ROE from Mayday Cleaning, he was not terminated by that firm at that point in time. Similarly, Ms. Bowers says that Mayday Cleaning did not terminate her employment on July 24, 2015, and that from July 27 to August 5, 2015, she was employed by both Mayday Cleaning and M3 Personnel. Ms. Bowers also says that she never was dispatched from M3

Personnel's office during this latter period and that all of her work assignments during this period emanated from Mayday Cleaning.

33. Ms. Maria Mudry also stated that Mayday Cleaning never terminated her employment. She says that her last day of work for Mayday Cleaning was July 2, 2015, and that she was on sick leave as and from July 6, 2015. She says that she never signed any payroll documents on July 28, 2015, in order to place her on M3 Personnel's payroll. She says that Mayday Cleaning issued her a ROE on July 28, 2015, that was backdated to July 24, 2015.
34. Ms. Toni Mudry says that she was an employee of both Mayday Cleaning and M3 Personnel between July 24 and August 5, 2015, and that Mayday Cleaning never formally terminated her employment.
35. The delegate concedes that Mayday Cleaning was experiencing financial difficulties as of July 24, 2015, but notwithstanding that situation, it was still an operating business with both employees and clients. The delegate says that "the facts of this case establish that all or part of the cleaning business was disposed of to [M3 Personnel] on July 25, 2015, when [M3 Personnel] became the employer of [Mayday Cleaning's] employees and began to provide services to [Mayday Cleaning's] clients". The delegate further says that while Mayday Cleaning's clients and employees were not "sold", there nonetheless was a disposition as contemplated by section 97 of the *Act* since M3 Personnel "assumed responsibility for the employment of [Mayday Cleaning] employees and for the provision of services to the Mayday clients".

Failure to Observe the Principles of Natural Justice

36. As noted earlier in these reasons, M3 Personnel's "natural justice" ground of appeal appears to have two components. First, M3 Personnel says that Ms. Dube's evidence was "vague and unreliable" and that the delegate should not have accepted her evidence. Further, since M3 Personnel "was not provided with an opportunity to cross-examine Ms. Dube or to test her evidence...it was a breach of natural justice to accept Ms. Dube's evidence in the absence of providing [M3 Personnel] with the express right to cross-examine the witness".
37. M3 Personnel also says that since the delegate "only spoke to one or two of the Complainants as part of the investigation" and "as a result, the Complainants' evidence is vague, inconsistent, cursory and unreliable". While it is not entirely clear from counsel's submission that this assertion is intended to advance a "natural justice" or "error of law" ground of appeal, I will address it as the former.

FINDINGS AND ANALYSIS

38. I will separately address the section 97 issue and the alleged breaches of natural justice.

The Section 97 Declaration

39. M3 Personnel's liability flows from section 97 of the *Act*. For ease of reference, I will again reproduce this provision: "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."
40. Although there is no definition of "disposed" in the *Act*, section 29 of the *Interpretation Act* includes the following definition: "**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 delegate concluded

that although the asset purchase never proceeded (and M3 Personnel was *not* the buyer under this agreement – the buyer was the Numbered Company), M3 Personnel nonetheless “took possession of [Mayday Cleaning] client contracts and took over paying [Mayday Cleaning] employees” and that these actions “constituted the disposal of a substantial part of the assets of the business from [Mayday Cleaning] to [M3 Personnel]” (page R10).

41. The proposed asset purchase agreement never completed and, in any event, M3 Personnel was not the buyer under that agreement. The evidence seems clear that there never was any sort of formal transfer of tangible assets from Mayday Cleaning to M3 Personnel. Under the article 5.3 of the aborted asset purchase agreement, Mayday Cleaning was required to terminate all of its employees by the July 28, 2015, closing date, and by article 5.4, the Numbered Company agreed only to hire such of those employees as it might deign to hire.
42. Although the asset sale agreement never completed, it appears that Mayday Cleaning took at least some formal steps to terminate its entire workforce. The evidence before the delegate clearly indicated that while ROEs were issued on July 28, 2015 (and backdated to July 24, 2015), the employees were not unequivocally terminated. Rather, the situation transpired as follows. The employees were advised that they should continue to report to work and, henceforth, M3 Personnel would pay their wages. During the July 25 to August 6, 2015, period, the employees continued to report to Mayday Cleaning’s office and were dispatched to service (using cleaning and other supplies retrieved from that office and utilizing Mayday Cleaning’s vehicles) what had formally been Mayday Cleaning clients. The complainants and Ms. Dube (record, page 125) all confirmed that the Mayday Cleaning employees continued to report to Mayday Cleaning’s office but, at the end of the workday, the employees would attend M3 Personnel’s office to receive payment. In effect, the employees were left in a state of “limbo” regarding their employment status.
43. It may well have been both Mayday Cleaning’s and M3 Personnel’s *intention* that the employees be formally terminated on or before July 24, 2015, but I am unable to find any clear evidence in the record that such terminations actually occurred. The key evidence on this latter point is Ms. Dube’s uncontradicted statement (delegate’s reasons, page R8) that while she issued ROEs dated July 24, 2015, “she never gave formal written notice of termination to the employees because they were to keep working during the transition to [M3 Personnel]”. As and from July 25, 2015, it would appear that M3 Personnel was an “employer” of these individuals (see section 1 of the *Act*) but notwithstanding the issuance of the ROEs, Mayday Cleaning also continued to be their employer since it continued to dispatch the employees and make available the necessary tools and equipment the employees needed in order to perform their duties. Mayday Cleaning’s status as “employer” did not end until August 6, 2015, when it closed down its operations following the union certification vote.
44. The Numbered Company did not issue formal notice of termination of the asset purchase agreement until August 10, 2015, when the Numbered Company’s solicitor wrote to Mayday Cleaning’s solicitor advising “the Buyer hereby gives notice of termination of the Asset Purchase Agreement” (record, page 116). It may be that during the interim period from July 25 to August 6, 2015, during which period M3 Personnel took responsibility for paying the employees’ wages, it was doing so in order to possibly salvage the asset purchase agreement. However, I need not make a finding in that regard, since I have already found that M3 Personnel met the statutory definition of “employer” during this period particularly since it was directing and controlling (together with Mayday Cleaning) where and when the employees would work.
45. It is conceded that M3 Personnel paid all of the employees regular wages (and vacation pay) earned during the July 25 to August 6, 2015, period. M3 Personnel’s liability for further unpaid wages (earned prior to July 25,

2015, while solely on Mayday Cleaning's payroll) and compensation for length of service thus critically depends on whether it was a "successor employer" as defined by section 97.

46. There never was any sort of formal asset transfer agreement between Mayday Cleaning and M3 Personnel. In order for M3 Personnel to be a "successor" there must have been a disposition of all or part of Mayday Cleaning's "business". This term is not defined in any the *Act*, the *Employment Standards Regulation* or in the *Interpretation Act*. The *Canadian Oxford Dictionary* defines "business", *inter alia*, as "buying selling; trade" and a "commercial firm". Mayday Cleaning's "business", in late July 2015, consisted of dispatching its employees to its customers' premises where the employees completed various janitorial and cleaning tasks. Mayday Cleaning would bill the customer directly and pay its own employees directly. Of course, since Mayday Cleaning's financial assets had been seized by the CRA, it was unable to pay its employees and thus, as and from July 25 to August 6, 2016, M3 Personnel paid the employees wages while the asset transfer agreement was still pending.
47. The facts of the present appeal bear some resemblance to those in *Spirit Ridge Resort Holdings Ltd.*, BC EST # D070/12, where, similarly, a section 97 declaration was issued despite there being no formal transfer of assets and no formal termination of the predecessor employer's employees. In *Spirit Ridge*, a tenant restaurant, facing financial difficulties, purported to "hand back" the restaurant to its landlord. The landlord, faced with exigent circumstances, simply stepped and carried on the restaurant's operations including meeting several catering contracts. I upheld the section 97 declaration noting (at paras. 20 and 23):

...In my judgment, the only reasonable interpretation to be placed on this latter action is that Spirit Ridge considered itself entitled, since it was continuing the restaurant operations, to take possession of, and some sort of title interest in, the restaurant's inventory. This action was not simply a landlord seizing the inventory on account of unpaid rent; rather, Spirit Ridge seized the inventory in order to continue the restaurant operations and its use of the business assets, with Spirit Ridge's apparent concurrence, can be a disposition within section 97 (see *Artech Machine & Tool*, BC EST # D147/04). In effect, Spirit Ridge became the new operator (without there being any interruption in the normal business operations) using the assets and inventory formerly held by Passa Tempo. I consider this situation to amount to a surrender of assets by Passa Tempo to Spirit Ridge coupled with the latter's acceptance of this surrender. To put the matter a different way, there was a "transfer" of the business assets (at least with respect to inventory) and thus a "disposition" within section 97 of the *Act*. Whereas Passa Tempo had formerly operated the business, it was now being operated by Spirit Ridge...

The present case is not unlike the situation in *Piney Creek Logging Ltd.* (BC EST # D546/98) where the "successor" took over a logging contract from the predecessor employer and business operations continued uninterrupted with the same workforce using the same tools and equipment as when they were in the predecessor's employ (see also *Mebar Forest Products Ltd.*, BC EST # RD040/02, and *Sladey Timber Ltd.*, BC EST # D360/02, to like effect). In this case, in addition to taking control of the restaurant's fixed assets and inventory, Spirit Ridge apparently took over existing catering and other contracts that had been negotiated with, and presumably would have been performed by, Passa Tempo.

48. *Spirit Ridge* was confirmed on reconsideration (BC EST # RD119/12) and by the B.C. Supreme Court on judicial review (2014 BCSC 2059). Tribunal Member Groves, on reconsideration, observed (at para. 38):

...it must be noted that the application of section 97 is not limited to situations where "assets" are disposed of. The section refers, in addition, to the disposition of all or part of a "business" as something separate and distinct from its "assets." This wording means that the section may be engaged when no assets are disposed of, but all or part of the "business" is. Thus, even if it could be said that Spirit Ridge did not take title to any assets of Numberco following the abandonment of the lease, its taking possession of them, even temporarily, in order to continue the operation of the restaurant, is sufficient to trigger the effect of section 97 (see *Sladey Timber*, BC EST # D360/02).

49. Despite M3 Personnel's legal counsel's assertion that, as and from July 25, 2015, the Mayday Cleaning employees did not report to Mayday Cleaning's office but, rather, "reported directly to M3 Personnel's office for their job assignments", the evidence before the delegate clearly shows that assertion to be incorrect. On and after July 25, 2015, the Mayday Cleaning employees continued to receive their work assignments from Mayday Cleaning, reported to that office to retrieve the necessary cleaning supplies, and then attended at the customer's location to do their work. At the end of workday, they *then* reported to M3 Personnel's office to receive their daily payment. I am unable to find any clear evidence in the record to indicate who actually billed the customers for the work undertaken. However, as previously noted, the delegate noted (at page R10): "...that [M3 Personnel] provided no evidence to refute that it billed and collected revenue from the customers for whom the Complainants performed work". Since M3 Personnel was paying the employees, it seems logical that it billed and collected the fees for the work performed; however, there is nothing in the record indicating that is what transpired.
50. Regardless of whether M3 Personnel or Mayday Cleaning actually billed the customers, it seems clear that during the period from July 25 to August 6, 2015, both Mayday Cleaning and M3 Personnel were working together to ensure that the customer cleaning contracts were being fulfilled. This is consistent with the fact that during this time frame the Numbered Company was still intending to acquire Mayday Cleaning's customer base and business operations as a going concern (recall the asset purchase agreement was not terminated until August 10, 2015).
51. In July 2015, Mayday Cleaning was effectively insolvent inasmuch as it was not apparently able to pay its debts (such as its employees' wages) as they fell due. The employees had not been paid for several weeks and although some or all of them might have taken the position that this failure to pay wages constituted a "constructive dismissal", none apparently did so. The employees continued to work hoping that they would eventually be paid. Thus, as of July 25, 2015, the employees continued to be employed by Mayday Cleaning although they were being paid by M3 Personnel for their work (who, during this time period, might also have met the statutory definition of "employer"). At this time, Mayday Cleaning may have had some goodwill and, of course, it also had a roster of customers who were seemingly still prepared to contract with Mayday for cleaning and other janitorial services. While neither the customers, nor the employees, were "sold" to M3 Personnel, I am persuaded that there was a "disposition" within the meaning of section 97 of the *Act*.
52. Mayday Cleaning operated a cleaning "business" and it effectively divested itself of that business during the July 25 to August 6, 2015, period when, in conjunction with M3 Personnel, it continued to have its employees fulfill its contracts and otherwise service its customer base with a view to having M3 Personnel ultimately acquire the entire cleaning business. As Ms. Dube explained (delegate's reasons, page R8), she expected that she, too, would be hired by M3 Personnel and "would continue to be responsible for the everyday operation of the business". At the very least, Mayday Cleaning was "divesting" itself of its client contracts and was otherwise releasing, giving or transferring its cleaning business to M3 Personnel during the period from July 25 through August 6, 2015. While Mayday Cleaning's business was being "disposed of", it continued to direct and control (although not pay) its employees and each of them retained their status as Mayday Cleaning employees on August 28, 2015 when they were formally placed on M3 Personnel's employee roster.
53. The record includes a note of a September 29, 2015, telephone conversation between the delegate and Ms. Dube in which the latter stated that the Mayday Cleaning employees continued to work for Mayday Cleaning's clients even after the ROEs were issued on July 28, 2015 [note: the ROEs were backdated to July 24, 2015], but that M3 Personnel paid the employees for this particular work. Ms. Dube was motivated to do whatever was necessary to facilitate this business transfer as she was looking to M3 Personnel for her continued livelihood. In order for that business transfer to occur, it was important that Mayday Cleaning continue on as a going concern and that is the principal reason why the employees continued to work as

directed by Mayday Cleaning during the July 25 to August 6, 2015, period. M3 Personnel paid the employees during this latter period for the simple reason that Mayday Cleaning's accounts were frozen and it had no independent means of paying the employees. M3 Personnel was prepared to pay the employees wages to ensure that the business carried on as a going concern, and it was this going concern the Numbered Company intended to acquire (recall, that the asset purchase agreement was not formally terminated until August 10, 2015).

54. The employees' employment continued without interruption during the "transition" from Mayday Cleaning to M3 Personnel. Each of the employees in question continued to be employed by Mayday Cleaning during the transition period (although they were also employed by M3 Personnel during this same period) when Mayday Cleaning's business was, for all practical purposes, being divested by Mayday Cleaning in order to be acquired by M3 Personnel.
55. In sum, I am not persuaded that the delegate erred in law in finding that M3 Personnel was a "successor employer" as defined in section 97 of the *Act* and, as such, separately liable for the wages (including compensation for length of service) awarded in favour of the various employees by way of the Determination.

Natural Justice

56. At the outset, it is important to note that the Determination was issued following an *investigation* rather than an *oral complaint* hearing. The Director of Employment Standards has the discretion to proceed using either adjudicative format although this discretion must be exercised in a fundamentally fair and reasonable manner. I have carefully reviewed the record and cannot find any indication that M3 Personnel – who was represented by legal counsel throughout the delegate's investigation – ever applied to have the matter adjudicated via an oral complaint hearing.
57. The various unpaid wage complaints were filed during the period from August 20 to October 30, 2015. In addition, and during the course of the investigation, the delegate identified other individuals who might also have unpaid wage claims. The delegate was entitled to include these individuals within the scope of her investigation: see subsection 76(2) of the *Act*.
58. Since the matter proceeded as a delegate's investigation, section 77 of the *Act* was triggered: "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond." It would appear that the delegate first contacted M3 Personnel by letter dated October 14, 2015. The delegate enclosed copies of the complaints that had been filed and also invited M3 Personnel to respond regarding the possible application of section 97. The delegate summarized the facts as she understood them as of the date of the letter, and also enclosed a demand for production of employment records relating to fifteen specified individuals as well as for any other former Mayday Cleaning employees that M3 Personnel placed on its payroll.
59. The record before me includes e-mail communications between the delegate and M3 Personnel's legal counsel during the period from October 22 to November 20, 2015. The delegate asked M3 Personnel's legal counsel to provide further particulars and corroborating documentation regarding the latter's position that all Mayday Cleaning employees were terminated as of July 27, 2015.
60. Counsel responded to this latter request, by e-mail dated November 15, 2015, stating that an attached e-mail from Ms. Dube to Mr. Brandt constituted the requisite evidence. In fact, this e-mail communication does not, in my view, even remotely corroborate the assertion that all Mayday Cleaning employees were terminated

on July 27, 2015. Counsel referred to article 5.3 of the asset purchase agreement (seller to terminate its employees prior to closing) but this provision does not in any fashion constitute *proof* that Mayday in fact terminated the employees – as I indicated, above, it may well have been the parties’ mutual *intention* that the employees be dismissed as per article 5.3 of agreement, but statements of intention are not proof of actual action. Further, counsel included an e-mail dated July 24, 2015, from Ms. Dube to Mr. Brandt which reads as follows:

We canceled services today for a 20 year client Woodrose Homes. Today was our 4th and last trip so he is not happy and move in is tomorrow. I need two of my glass guys and 2 good cleaners to finish tomorrow and we have issued ROES to all staff with today last day worked. I have workers that will do it, can we pay them through M3?

With respect to this July 24 e-mail, M3 Personnel’s legal counsel took the position: “The owner of Mayday Cleaning Services confirmed in the email below that she terminated all of the employees on July 24, 2015. As a result, at law my client cannot be liable for any wages or severance owing to the employees prior to July 24, 2015”. Several points are to be noted. First, the issuance of an ROE is not necessarily equivalent to a formal termination as of the date the ROE was dated, or even issued to the employee – although, in many cases, that may be so (see *Closson v. Falt Towing Ltd.*, 1993 CanLII 574 (B.C.C.A.)). Second, as we now know, the Mayday Cleaning employees did not receive their ROEs on July 24 but, rather, on July 28, 2015 (although the ROEs were backdated to July 24, 2015) and thus Ms. Dube’s statement is factually incorrect. Third, Ms. Dube’s e-mail specifically contemplates that certain Mayday Cleaning employees will continue working but she was asking M3 Personnel to take responsibility for paying those employees.

61. There was continuing correspondence between the delegate and M3 Personnel’s legal counsel in early 2016. By letter dated February 19, 2016, M3 Personnel’s legal counsel laid out his client’s position with respect to the entire matter including a possible section 97 declaration. At no point in this letter did counsel ask for an oral hearing or suggest that Ms. Dube’s evidence was not reliable – indeed, he specifically relied on Ms. Dube’s July 24, 2015, e-mail. The parties’ correspondence culminated in a letter dated April 11, 2016, from the delegate to both M3 Personnel and its legal counsel, requesting that any final submission be filed by no later than April 18, 2016. The record does not contain any form of further reply from M3 Personnel or its counsel and, on May 13, 2016, the delegate issued the Determination and her accompanying reasons.
62. Having reviewed the record of correspondence and e-mail communications between the delegate and M3 Personnel’s legal counsel, I can find absolutely nothing that would suggest M3 Personnel took issue with the fact that the delegate was conducting an investigation rather than convening an oral complaint hearing. In my view, the delegate fully complied with her section 77 duty, and throughout the investigation M3 Personnel was given every reasonable opportunity to respond to the issues raised by the several complaints.
63. Having reviewed the various statements the complainants submitted to the delegate during the course of her investigation, I am wholly unable to conclude that their evidence was, as alleged by M3 Personnel’s legal counsel, “vague and unreliable” or “inconsistent”. In my view, the complainants’ evidence was not at all vague and, in my view, the complainants’ evidence was very consistent. I am unable to agree that their evidence was unreliable.
64. In my view, there is no merit whatsoever to the argument that the delegate failed to observe the principles of natural justice in making the Determination.

ORDER

- ^{65.} Pursuant to subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued in the total amount of \$46,130.37 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal