EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act, S.B.C. 1995, c. 38

-by-

B.J. Heatsavers Glass & Sunrooms Inc.

("Heatsavers")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/708

DATE OF HEARING: March 19th, 1997

DATE OF DECISION: March 31st, 1997

DECISION

APPEARANCES

Brian Johnston and
Maureen Johnston for B.J. Heatsavers Glass & Sunrooms Inc.

Diane Regan on her own behalf

Gerry Omstead for the Director of Employment Standards

OVERVIEW

This is an appeal brought by B.J. Heatsavers Glass & Sunrooms Inc. ("Heatsavers" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from Determination No. CDET 004615 issued by the Director of Employment Standards (the "Director") on November 7th, 1996. The Director determined that Heatsavers owed its former employee, Diane Regan ("Regan"), the sum of $2,398.87 on account of unpaid vacation pay (see section 58 of the *Act*) and interest.

The appeal was heard in Victoria on March 19th, 1997 at which time I heard testimony from Maureen and Brian Johnston, on behalf of the employer (both of whom are directors and officers of Heatsavers), and from Ms. Regan. Mr. Omstead, on behalf of the Director, did not present any evidence.

FACTS

Regan was employed as a commissioned sales representative with a company known as The Heatsavers Inc. from March 1987 until approximately July 3rd, 1994 when her employment with The Heatsavers Inc. terminated and a new employment relationship, again as a commissioned sales representative, commenced between Regan and B.J. Heatsavers Glass & Sunrooms Inc. The latter employment relationship ended on or about September 13th, 1996.

Heatsavers was incorporated pursuant to the provisions of the B.C. *Company Act* on June 24th, 1994. This company purchased certain business assets from The Heatsavers Inc. The Heatsavers Inc. formerly sold and installed sunrooms, gas stoves and fireplaces. B.J. Heatsavers Glass & Sunrooms Inc. acquired only the "sunroom" part of The Heatsavers Inc.'s business and currently sells and installs sunrooms in the greater Victoria area.

Mr. Brian Johnston was a former employee of The Heatsavers Inc. and he caused a new company to be incorporated (the appellant employer) to purchase the "Heatsavers" name and other business assets such as tools and office equipment and some "work in progress". A truck lease was also transferred from the vendor to the buyer at the time of the asset purchase. The asset purchase was completed in early July 1994.

Prior to the asset purchase, Brian Johnston approached Ms. Regan and inquired if she would be interested in continuing her position as a sales representative with the new company. Regan agreed and essentially ended her employment with The Heatsavers Inc. on July 3rd, 1994 and then commenced employment with B.J. Heatsavers Glass & Sunrooms Inc. the next day.

The evidence before me, both from the employer and Ms. Regan, is that her duties remained essentially unchanged from one firm to the next--she followed up sales leads, made sales presentations in customers' homes, prepared price quotes and sales contracts and followed up on installations. Her compensation was based on a 10% commission on the installation contract sale price.

ISSUES TO BE DECIDED

The appellant employer has raised two issues on this appeal. The first is whether or not Regan was an employee under the *Act.*

Second, the employer says that the Director erred in calculating Regan's vacation pay at a rate of 6% when she had not completed at least five consecutive years of employment with Heatsavers.

ANALYSIS

Was Regan an employee of Heatsavers?

The nub of the first ground of appeal is a one-page letter addressed to the employer, dated November 29th, 1995, from Revenue Canada which states, in part:

> Based on the information obtained, we have decided that the working arrangement under which they [Regan and another employee] perform services is not an employer-employee relationship, and is therefore not insurable for purposes of the Unemployment Insurance Act. In addition, the workers are not pensionable as employees for purposes of the Canada Pension Plan.

It should be noted that when one is dealing with statutory definitions, a particular individual may well be an employee for the purposes of one statute but not for another. For example, the definition of "employee" contained in the B.C. *Labour Relations Code* excludes certain managerial and "confidential" personnel who are nonetheless employees for purposes of the *Employment Standards Act.*

In my view, Regan clearly was engaged in an employment relationship with Heatsavers. She was initially treated as an employee by Heatsavers and the matter of her status was only called into question by reason of the previously noted November 29th, 1995 letter from Revenue Canada.

Section 1 of the *Act* defines an employee as follows:

> 1. (1) "employee" includes
>
> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
>
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,...

Further, wages are defined in the *Act* as follows:

> 1. (1) "wages" includes
>
> (a) salaries, **commissions** or money paid or payable by an employer to an employee for work,

> (b) money that is **paid or payable by an employer as an incentive** and relates to hours of work, **production** or efficiency...
>
> (emphasis added)

Work is defined in the same section of the *Act* as follows:

> 1. (1) "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

In light of these interrelated definitions, it seems obvious that Regan was an employee for purpose of the *Act*--she was in a position of economic dependence with respect to Heatsavers; that company treated her as an employee from the outset of the relationship, issuing her T-4 slips and making all the appropriate statutory deductions as though she was an employee; she worked out of Heatsavers premises and was held out by Heatsavers as an employee of the firm; she had authority to commit Heatsavers to a particular contract price; and she was ultimately subject to the direction and control of Brian Johnston.

Was Heatsavers obliged to pay vacation pay at a rate of 4% or 6% of earnings?

The second issue raised in this appeal concerns section 97 of the *Act:*

> 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 by the disposition.

The Director relied on this provision of the *Act* when calculating Regan's vacation pay entitlement based on 6%, rather than 4%, of earnings. The current section 97 is virtually identical to section 96 of the former *Employment Standards Act* which was considered by our Court of Appeal in *Helping Hands Agency Ltd. v. B.C. Dir. of Employment Standards* (1995) 131 D.L.R. (4th) 336. In *Helping Hands* the Court of Appeal noted that this provision ought to be given "fair, large and liberal construction as best insures the attainment of its objects".

In the present case, the evidence before me is that The Heatsavers Inc. sold its entire "sunroom" sales and installation operations to B.J. Heatsavers Glass & Sunrooms Inc. As part and parcel of the asset sale transaction, Brian Johnston, the principal

behind the purchasing firm and a former employee of the vendor firm, approached Regan and offered her continued employment with the buyer.

The purchasing firm was not obliged to offer Regan continued employment, but having done so, her employment is, by virtue of section 97, deemed "to be continuous and uninterrupted by the disposition". Accordingly, Regan's employment with the purchasing firm is deemed to have commenced as at the commencement date of her employment with the vendor firm, namely, March 1987. Thus, given that Regan was deemed to have had more than five years' service with Heatsavers, the Director did not err in calculating her vacation pay entitlement based on 6% of earnings.

I might add that Heatsavers acknowledges that if Regan is entitled to vacation pay at the 6% rate, the calculations set out in the Determination are correct.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 004615 be confirmed in the amount of $2,398.87 together with whatever further interest that may have accrued since the date of issuance pursuant to section 88 of the *Act.*

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal