

An appeal

- by -

Canaway Holdings Ltd. operating as Fairway Market
("Canaway or employer")

- 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: Paul E. Love

FILE No.: 2001/66

DATE OF DECISION: April 5, 2001

DECISION

OVERVIEW

This is an appeal by the employer of a Determination dated January 8, 2001, issued by a Delegate of the Director of Employment Standards pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “Act”), concerning the rate of vacation pay owing to Lisa Stevenson. The issue in this case was whether Ms. Stevenson had sufficient years of service for calculation of vacation pay at the 5 year of service rate. This depended on whether the employment was deemed to be continuous by virtue of s. 97 of the Act. Ms. Stevenson commenced employment in 1991 with Amar Investments Ltd. (“Amar”). In December of 1995 there was a disposition of a substantial portion of the assets of Amar to 505915 B.C. Ltd. The disposition took place because of a seizure of assets, termination of a lease, and the issuance of a new lease to a company controlled by a creditor of Amar. Amar did not terminate its employees, and there was no proof that the employees were terminated prior to the disposition of the assets. 505915 B.C. Ltd. was a successor employer by virtue of s. 97 of the Act. Canaway Holdings Ltd. was a successor employer to 505915 B.C. Ltd. acquiring the assets by way of asset purchase agreement. The employer was required to give credit for the past years of service and the employee was entitled to vacation pay calculated at 6 % , the rate for employees with five or more years of service.

ISSUE TO BE DECIDED

Did the Delegate err in finding that the events occurring in December of 1995 whereby the operation of the Oak Bay Village Market passed from Amar Investments Ltd to 505915 B.C. Ltd. constituted a disposition of the business within the meaning of s. 97 of the Act?

Was 505919 B.C. Ltd. a successor employer within the meaning of s. 97 of the Act?

FACTS

Lisa Stevenson filed a complaint for vacation pay against Canaway Holdings Ltd. operating as Fairway Market (“the employer” or “Canaway”). The amount of vacation pay entitlement under the Act depends on the length of service of an employee. After 5 years of continuous employment, s. 58(1)(b) of the Act provides that the employee is entitled to vacation pay calculated at 6 %. The amount of the vacation pay entitlement depends on whether Ms. Stevenson’s employer at the time of termination is a successor employer. If Canaway is a successor employer, and Ms. Stevenson had continuous employment the employer is obliged to pay vacation pay at the rate of 6 %.

Lisa Stevenson was employed at the Oak Bay Village Market, and her employment commenced on October 26, 1991. At the time that she commenced her employment, the Oak Bay Village Market was owned by Amar Investments Ltd. (“Amar”) and operated in premises Amar leased

from Monterey Mews Ltd./G.A.P. Holdings Ltd (“landlord”). In the latter part of 1995, Amar became indebted to its wholesaler, Wilson Foods (1994) Ltd (“wholesaler”) and Marta Boissevain. The wholesaler and Ms. Boissevain held a general security agreements (“GSA”) over all of Amar’s property, but the wholesaler’s GSA had a charge over Amar’s lease with the landlord and had priority. Amar’s equipment was leased from Tudor Merchandising Services & Leasing Inc..

On or about December 8, 1995 because of rent arrears, the landlord entered the premises, changed the locks and terminated Amar’s lease. Simultaneously Boissevain entered the market seized equipment and inventory. On December 9, 1995 the landlord granted a new lease to 505915 B.C. Ltd., a company controlled by Boissevain. Boissevain carries on the business of operating the market through 505915 B.C. Ltd. In May of 1997 Canaway Holdings Ltd., purchased the assets of 505915 B.C. Ltd. and continued the operation of the market.

Up until May 20, 1997 Ms. Stevenson worked at the Oak Bay location. From May 20, 1997 to March 24, 2000 Ms. Stevenson worked at Canaway’s retail food store in Saanich.

Employer’s Argument:

Canaway says that the employment of Ms. Stevenson was not continuous. Canaway says that Stevenson and other employees were terminated as of December 8, 1995. Canaway says that Ms. Stevenson was entitled to vacation pay based on 4 % not 6% calculated from December 15, 1995 and not from October 26, 1991. The employer relies on another Determination issued by another Delegate (“*Poulton Determination*”), and alleges that the effect of the Poulton Determination was that the employment was not continuous because the Delegate held that 505915 B.C. Ltd. was not responsible for wages earned and payable prior to December 8, 1995. The employer pleads *res judicata*, and says that because of this ruling the employment must be deemed to be not continuous. The employer says because the employment of Ms. Stevenson was not continuous, the calculation of her holiday pay is based on service from December of 1995 to the date of termination at 4 % of annual wages.

There is no issue that Canaway is the successor to 505915 B.C. Ltd.. The employer argues that 505915 B.C. Ltd. is not a successor to Amar.

Employee’s Argument:

The employee says that she has had uninterrupted continuous employment since October of 1991, regardless of what transpired between Amar, 505919 B.C. Ltd. and Canaway. She states that she does not recall being terminated or rehired by any employer. Ms. Stevenson states that she is entitled to holiday pay calculated at 6 %..

Director's Argument:

In the Determination, the Delegate said that the key matter was the nature of the “takeover” of the employer in December of 1995. The Delegate found that the takeover amounted to a disposition of the business assets within the meaning of s. 97 of the *Act*. The Delegate commented that no evidence was put forward by the employer to substantiate the termination and rehiring of the employees at the Oak Bay Village Market. The Delegate found that the operation of the market was not substantially different from the market as operated by another corporate entity before the events of December 1995. The Delegate found that there was little change in the staff complement, staff duties, type of business or location of the business after December of 1995.

The Delegate found that the employment of Ms. Stevenson with Amar and 505919 B.C. Ltd and Canaway Holdings Ltd. was continuous from October 26, 1991 to March 24, 2000, and was uninterrupted by dispositions that occurred in that period. The Delegate found that Ms. Stevenson was entitled to 6 % vacation pay from October 26, 1996 onwards, and that the employer paid 4 % vacation pay from May 20, 1997. The Delegate found that Ms. Stevenson was entitled to an additional 2 % vacation pay for the period May 20, 1997 to March 24, 2000, in the amount of \$1,270.64 plus interest in the amount of \$73.06.

The Director says that the *Poulton Determination* is not a determination that the employees at the market were terminated. The Director says that the employer's submission is a misinterpretation of a determination issued on January 31, 1996 by Michael Poulton (“*Poulton Determination*”). The Director says that the *Poulton Determination* dealt with wages and vacation pay, and did not address the issue of termination or compensation for length of service.

ANALYSIS

The burden rests with the appellant, in this case the employer, to establish an error in the Determination, such that I should vary or cancel the Determination. This case turns on the application of s. 97 of the *Act*. Section 97 reads as follows:

If all or part of a business or 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 sale.

In *Helping Hands Agency Ltd. v. British Columbia (Director of Employment Standards)*, 1995 B.C.J. NO 2524 (C.A.), the Court of Appeal held that the effect of s. 97 of the *Act* was to alter the common law, that the purchaser of a business was not required to give credit for past service with the vendor.

The Tribunal has summarized, recently, the Tribunal's jurisprudence related to s. 97 in *Director of Employment Standards, BCEST #RD 046/61* (issued on January 22, 2001). Focussing on the events in December of 1995, the critical questions in the analysis to trigger s. 97 are:

Has there has been a disposition of the business or a substantial part of the assets?

Was there employment with the “vendor” at the time of the disposition?

(Teamwork Property Solutions Ltd., BCEST #D434/98).

A leading case on s. 97 is *Lari Mitchell, #D314/97*. *Lari Mitchell* stands for the proposition that unless appropriate arrangements are made so that the termination of the employees is completed before the asset sale or transfer takes place, the employment of the employees is deemed to be continuous. If the employee is an employee at the date of disposition, the new purchaser assumes the employment obligations of the Vendor.

I turn now to the critical issues.

Was there a disposition of the business or a substantial part of the assets of the business?

In my view it cannot be seriously contended that the seizure of assets, retaking of possession by the landlord, and releasing of the premises and assets to 505915 B.C. Ltd. was anything but a disposition of a business or a substantial portion of the assets of the business. The word “disposition” is not defined in the *Act*, but it is of broad import and encompasses a range of transfer of assets and business: *Dr. Robert S. Wright Inc., BCEST #D060/96*. In this case, the business of Amar was disposed to 505915 B.C. Ltd. by way of seizure of the assets, and by lease of the business premises to 505915 B.C. Ltd.. In my view it is inconsequential whether 505915 B.C. Ltd. acquired title to the business by purchase of the assets from Amar, or acquisition of the assets through the secured creditors. In this case the operating mind of 505915 B.C. Ltd. was Marta Boissevain, who also was a secured creditor, and the seizure and transfer of assets and new lease to 505915 B.C. Ltd., was a simultaneous process. Thereafter 505915 B.C. Ltd. operated the market until it disposed of the assets to Canaway by asset purchase agreement.

Was Ms. Stevenson an employee of the business at the date of the transfer of assets?

Ms. Stevenson commenced her employment in 1991. If she was terminated one would expect to see some evidence of that termination by way of documents, for example a notice of termination, and a record of employment. A written termination notice is necessary in order to discharge obligations to pay compensation for length of service (see s. 63(3) of the *Act*). There is no evidence before me that Amar gave Ms. Stevenson a written termination notice. Counsel for the employer has asserted that Ms. Stevenson was terminated and rehired by 505915 B.C. Ltd. There is simply no evidence of that before me. The evidence before me on the issue of whether Ms. Stevenson was terminated consists of Ms. Stevenson’s written submission that her employment is continuous and that she did not recall being given notice.

The employer has filed a notice to the employees of the Oak Bay Village Grocery from 505915 B.C. Ltd. which amounts to an offer of employment on the same terms of conditions as with Amar except that 505915 B.C. Ltd. says that the new employees will be probationary employees

until the new company has had an opportunity to establish its staffing requirements. The notice also indicates that 505915 B.C. Ltd. will not be giving credit for past service with Amar. I note that this notice is dated December 8, 1995 and the allegation by counsel for Canaway Holdings Ltd. is that the notice was delivered on December 10, 1995. From the face of the notice, it appears that the 505915 B.C. Ltd. purports to deal with the employees after there had been a disposition of the entire assets of the business, as the notice references a termination of the tenancy of Amar, a new lease with 505915 B.C. Ltd., and seizure the property of Amar pursuant to the General Security Agreement all on December 8, 1995.

There is no evidence of any hiatus in the operations of the Oak Bay Village Market, and no evidence that the employment status of the employees was dealt with by the parties (Amar or 505915 B.C. Ltd) prior to the date of the change in ownership and possession of the assets.

I note that the notice dated December 8, 1995 does not indicate that 505915 B.C. Ltd. was terminating the employees. 505915 B.C. Ltd. purported to make some unilateral changes to the employment relationship, at a time when, as a matter of law, a successorship had occurred under s. 97 of the *Act*. There is no evidence of any consideration for the changes, 505915 BC Ltd., proposed to make to the employment contracts of its employees. It is apparent, from the notice, that 505915 B.C. Ltd. was operating under a mistaken premise. It already was the employer of the employees because it had the assets and business of Amar.

I note that counsel has made a written submission that 505915 B.C. Ltd. gave notice to the employees of the change in ownership, and indicated that 505915 B.C. Ltd. interviewed Amar's ex employees and hires the majority of them, and that 505915 B.C. Ltd. commences operation on or about December 15, 1995. The only critical date for the purposes of the analysis is the date of disposition of Amar's business. I note that a written submission of counsel for Canaway Holdings Ltd. is not evidence of the dealings between Amar and its employees and 505915 B.C. Ltd. and its employees. There is no evidence that counsel had any personal knowledge of the events which are set out in the submissions. I prefer the statement of Ms. Stevenson that she was not given any notice of termination of her employment and that her employment was in fact continuous.

Res Judicata:

The employer has argued that there is a *res judicata* effect to the *Poulton Determination*. The employer notes that in order to give some meaning to the *Poulton Determination* one has to conclude that the Mr. Poulton determined that 505915 B.C. Ltd. was not a successor employer. I note that I am not required to reconcile the Poulton Determination with this decision. It is a Determination of the Delegate, and not a decision of the Tribunal. It was never appealed or considered by the Tribunal.

I note that the Tribunal has considered "res judicata" in the past: *Scott*, *BCEST #D052/97* and indicated that for *res judicata*, or issue estoppel, to operate the following conditions must be present:

- i) the identical issue has been previously decided;
- ii) the previous decision was final; and
- iii) the previous decision involved the same parties, or their privies.

It is apparent that when one reviews the *Poulton Determination* that the identical issue has not been decided previously. That Determination found that Amar and a related company were obliged to pay wages and unpaid vacation pay due and owing as of December 8, 1995. This decision made no pronouncement as to whether 505915 B.C. Ltd. was a successor employer, pursuant to s. 97 of the *Act*, or whether employees were terminated by Amar or 505915 B.C. Ltd.. Further, I note that Ms. Stevenson was not a party to the *Poulton Determination*, and was not aware of the *Poulton Determination* until it was raised by the employer. The *Poulton Determination* might have been more compelling had the Delegate dealt with the issue of compensation for length of service, which would have raised squarely the issue of whether other employees were terminated. The *Poulton Determination* is of no assistance in the assessment of the issue of successorship in this case. The *Poulton Determination* can be reconciled on the basis that the Delegate determined that Amar was required to pay wages to its employees while, Amar was the employer of the employees.

For the above reasons, I find that the Delegate has not erred in the Determination, with regard to a finding that 505915 B.C. Ltd. was a successor employer. The employment of the employee is deemed to be continuous. The present employer is required to give credit for the past years of service in assessing the vacation pay entitlement of Ms. Stevenson. The appropriate rate is 6 %, given that because of the application of s. 97 of the *Act*, she has five or more years of service.

ORDER

Pursuant to section 115(a) of the *Act*, the Determination dated January 8, 2001 is confirmed.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal