

An appeal

- by -

Tekmo Industrial Design Ltd. dba Budget Brake & Muffler
("Tekmo")

- 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.: 2003/22

DATE OF DECISION: May 27, 2003

DECISION

OVERVIEW

This decision concludes an appeal brought pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Tekmo Industrial Design Ltd. (“Tekmo”) of a Determination that was issued on November 18, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Tekmo had contravened Part 8, Section 63 of the *Act* in respect of the employment of Joseph Tarzwell (“Tarzwell”) and ordered Tekmo to cease contravening and to comply with the *Act* and *Regulations* and to pay an amount of \$3,885.73.

Tekmo appealed the Determination on the ground that the Director misinterpreted Section 97 of the *Act* and, as a result, erred in concluding Tekmo was liable to Tarzwell for length of service compensation.

In decision BC EST #D086/03, the Tribunal referred the matter back to the Director, indicating there was insufficient information on file to allow the appeal to be adjudicated. Additional information has been submitted. The appeal may now be adjudicated. An oral hearing is not required.

ISSUE

The issue raised by the appeal is whether the Director erred in concluding Tekmo was liable to Tarzwell for length of service compensation.

FACTS

The following facts were set out in decision BC EST #D086/03:

Tekmo operates a Budget Brake and Muffler shop. Tekmo had purchased the business and assets of the Budget Brake and Muffler shop from 428928 B.C. Ltd. The purchase was completed April 8, 2002.

Tarzwell was originally hired by 428928 B.C. Ltd. on May 3, 1993 as a motor vehicle mechanic. The Determination indicated that Tarzwell was given working notice of termination of employment by 428928 B.C. Ltd. prior to the completion of the purchase.

On April 3, 2002 Tarzwell was offered employment with Tekmo. He started working for Tekmo on April 8, 2002, earning \$15.00 an hour for a typical work week of 40 hours. He was laid off by Tekmo on June 15, 2002 and was paid two weeks’ wages in lieu of notice..

The Director decided that Tekmo was liable to pay Tarzwell compensation for length of service based on the length of his employment with both 428928 B.C. Ltd. and Tekmo. In reaching that decision, the Director referred to and applied Section 97 of the *Act*, which says:

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.

The Determination contains the following analysis on the effect of Section 97 to the circumstances:

The vendor, 428928 B.C. Ltd., gave working notice to Tarzwell, but the notice had no effect because the purchaser, Tekmo, employed Tarzwell with no interruption in his employment. If employees are employed by a purchaser and are subsequently terminated, the purchaser is responsible for compensation for length of service pay, or working notice, calculated from their original date of hire.

The Determination had referred to an assertion by Tekmo that Tarzwell had received ‘working notice’, but there was no document on file indicating whether that notice was written notice or, if it was written notice, what its terms were. As a result of the referral back, a written document was discovered and produced to the Tribunal in this appeal. I am accepting this evidence on the basis that it was not reasonably available to Tekmo when the appeal was filed, not being either generated by them, received by them or copied to them. The document is dated February 15, 2002. It is headed:

NOTICE OF TERMINATION OF EMPLOYMENT OF
Joe Tarzwell

It is from 428928 B.C. Ltd., Tarzwell’s employer at the time, is addressed to Tarzwell and states, In part:

This is to inform you that your employment with 428928 B.C. LTD. dba Budget Brake and Muffler will terminate at 5:00 p.m. on April 6, 2002.

Reason - Business being sold to Tekmo Industrial Design LTD. who will commence business operations on April 8, 2002 and who is obligated to hire you at no less than present wage levels and benefits, starting April 8, 2002.

There is no indication from Tarzwell that he did not receive the notice of termination on the date shown in the document.

There is no issue, and nothing on the file suggesting, that the sale of the business from 428928 B.C. Ltd. to Tekmo was not arm’s length or that 428928 B.C. Ltd. and Tekmo were associated entities.

ARGUMENT AND ANALYSIS

In *Body Rays Tanning Centre Ltd.*, BC EST #D041/03, the Tribunal referred to the following summary of the interpretation and application of Section 97 of the *Act* from *Dharampal Singh Gill*, BC EST #D544/00 (Reconsideration denied, BC EST #RD040/02):

Section 97 is triggered when the individual in question is an “employee of the business” on the date of the disposition. The disposition itself does not terminate the employment relationship; the employment relationship merely continues with the successor employer being, in effect, substituted for the previous employer as the employer of record. This is not to say that the new employer must continue to employ all of the employees of the former employer. However, unless appropriate arrangements are made so that the employment of such persons is terminated on or before the disposition is completed, those employees continue on as employees of the new employer and retain all of their accrued rights and entitlements (including service-based benefits), but only insofar as the Act is concerned, vis-à-vis the new employer--see *Helping Hands Agency Ltd. v. B.C. Director of Employment Standards* (1995), 15 B.C.L.R. (3d) 217 (B.C.C.A.).

In *Director of Employment Standards (Re Primadonna Ristorante Italiano)*, BC EST #RD046/01 (Reconsideration of BC EST #D466/99), the Tribunal affirmed the position that the operation of Section 97 is contingent on there being both a disposition and employment with the ‘vendor’ at the time of disposition. If an employee is terminated in accordance with the requirements of the *Act* on or before the disposition, Section 97 is not applicable.

Under the *Act*, Tarzwell was entitled to seven weeks written notice of termination of his employment with 428928 B.C. Ltd., which is what he received. The requirements of the *Act* were met and he ceased to be an employee of 428928 B.C. Ltd. on April 6, 2002, two days before the disposition of the business from 428928 B.C. Ltd. to Tekmo was completed. Accordingly, one of the conditions to the application of Section 97 was absent and the Director was wrong to have concluded that Section 97 of the *Act* applied.

The appeal succeeds.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated November 18, 2002 be cancelled.

David B. Stevenson
Adjudicator
Employment Standards Tribunal