

An appeal

- by -

Carolyn Anne Macdonald operating as Bukowski's Restaurant

- 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: Carol L. Roberts

FILE No.: 2005A/165

DATE OF DECISION: December 19, 2005

DECISION

SUBMISSIONS

M.J. (Peggy) O'Brien, Lawson Lundell on behalf of Carolyn MacDonald
Michelle Alman on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Carolyn Anne MacDonald, pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued August 4, 2005.
2. Stacy Bestard was employed as the General Manager of Bukowski's Restaurant ("Bukowski's"). Bukowski's was operated by Bukowski's Ventures Ltd. ("Ventures"), owned by Gus Vassos. Ms. MacDonald was a party to a General Security Agreement ("GSA") with Ventures.
3. On February 6, 2004, Ms. MacDonald seized the restaurant's assets under the GSA when Ventures defaulted on a loan payment. Although the record is not clear on this point, it appears that Ms. MacDonald's agent, Jack Savage, operated Bukowski's as a going concern on her behalf from February 6th. On February 16, 2004, Ms. MacDonald incorporated Fly By Night Operations Inc. ("Fly By Night"), which purchased Ventures' assets. Bukowski's was managed and control by Mr. Savage and Fly By Night after that date.
4. On about February 6, 2004, Mr. Savage left a message on Ms. Bestard's telephone asking her to meet with him. They met on February 10, at which time Mr. Savage told Ms. Bestard that her former employer was no longer operating the business, and the new operators had no need for her services.
5. Ms. Bestard complained to the Director of Employment Standards that Ms. MacDonald had failed to pay her regular wages, annual vacation pay, compensation for length of service and compensation for employer's business costs.
6. Following an investigation of the complaint, the Director's delegate determined that Ms. Bestard continued as an employee of the business until February 10, 2004. He concluded that Ms. Bestard's employment was continuous and uninterrupted by the disposition under section 97 of the *Employment Standards Act*, and that she was entitled to wages, compensation for length of service, annual vacation pay and employer business costs. The delegate determined that Ms. Bestard was entitled to wages and interest in the total amount of \$18,253.36.
7. The delegate also imposed three \$500 penalties on "Carolyn Anne MacDonald operating as Bukowski's Restaurant" for contraventions of sections 18, 21 and 63 the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.
8. Ms. MacDonald appeals five of the delegate's conclusions. I have decided to proceed on only one issue at this time; that is, whether the delegate erred in law in finding that Ms. MacDonald's seizure of the restaurants assets is a disposition of a business within the meaning of section 97 of the Act.

9. I have advised the parties that, if I conclude that the delegate did not err, I would consider the remaining grounds of appeal, along with the request for an oral hearing.

ISSUE

10. Did the delegate err in concluding that the Ms. MacDonald's seizure of Bukowski's assets under the GSA constitute a disposition within the meaning of section 97 of the *Act*?

THE FACTS AND ARGUMENT

11. In November 2001, Ms. MacDonald lent Ventures a sum of money. To secure the repayment, Ventures, represented by Mr. Vassos, executed a promissory note, signed a personal guarantee, and entered into a GSA with Ms. MacDonald. On February 6, 2004, Ms. MacDonald engaged a bailiff to seize Bukowski's assets upon Ventures defaulting on its obligations under the GSA. Mr. Savage, on Ms. MacDonald's behalf, telephoned Ms. Bestard that day to advise her of the seizure and that Ventures was no longer operating Bukowski's. All of the other 27 employees continued to be employed and Bukowski's continued to operate under Mr. Savage's management.
12. As it happened, Mr. Savage was unable to communicate this information to Ms. Bestard until February 10, 2004, as she was not working at Bukowski's on February 6, and did not work between February 6 and February 10, 2004.
13. On February 16, 2004, Ms. MacDonald incorporated Fly by Night. Bukowski's was managed thereafter by Mr. Savage and Fly By Night.
14. Ms. MacDonald did not offer Ms. Bestard employment, nor did Ms. Bestard continue working at the restaurant after February 6, 2004.
15. The first issue considered by the delegate was the identity of Ms. Bestard's employer.
16. The delegate found that Ms. Bestard was an employee of Bukowski's until February 10, 2004, and that her employment was "continuous and uninterrupted" by Ms. MacDonald's seizure of the assets. The delegate found that, since Fly-By-Night, Ms. MacDonald's operating company, was not incorporated until February 16, 2004, the employer was Carolyn Anne MacDonald operating as Bukowski's Restaurant.
17. In arriving at this conclusion, the delegate considered the definition of "dispose" in section 29 of the *Interpretation Act* in the absence of any definition in the *Employment Standards Act*, which defined "dispose" to mean "transfer by any method and includes assign, give, sell, grant, charge, convey, bequest, devise, lease, divest, release and agree to do any of those things."
18. He concluded:

If the applicable legal definition of "dispose" means in part to transfer by any method (underscored for emphasis) then Macdonald's seizure of the restaurant and its assets from Vassos or Ventures fits within that definition. The definition itself is meant to be given broad and general interpretation by the very nature of its construct and the use of the words "any" and "includes".

Savage also appears to rely upon the fact that Macdonald was a “creditor” and not an “investor” in his position to discredit the application of Section 97 in this instance. There is no reference to either term in that section of the Act but rather it speaks to the disposal of all or apart of a business or a substantial part of the entire assets of a business and what happens to the employment status of an employee. There is no apparent restriction of its application based on the parties’ titles or status, the purpose driving the process or in the presumed intent of the parties be it a common goal, good will or otherwise. The facts are that the parties have been identified as has what took place and when. References to vendors, debtors et al are means to identify the parties involved and are used in policy statements and decisions to either serve as examples or to reflect the case at hand whichever applies. The terms used are not restrictive or exclusive in nature and thereby bar all other participants from the application of Section 97. [reproduced as written]

19. Counsel for Ms. MacDonald contends that the delegate’s interpretation of section 97 constitutes an error of law. She submits that section 97 applies only where the business or the assets are sold or voluntarily disposed of, not to those circumstances where the creditor seizes the assets of a defaulting party to a loan agreement. She relies on the title or heading of the section, which refers to the sale of a business or assets, and the decision of the Saskatchewan Queen’s Bench in *Engel v. Clarkson Co.* [1982] S.J. No. 891 (QL). In that case, a parallel provision of the Saskatchewan *Labour Standards Act* was found to apply to situations where the employer voluntarily divested himself of the business, not to dispositions resulting from the realization by a creditor on security granted by the employer:

... the section was never meant to cover [the liquidation of assets]. The section was intended to apply to situations where the employer voluntarily or actively divested himself of his business, but not to dispositions resulting from the realization by a creditor on security granted by the employer... Use of the words “sold, leased, transferred” also implies to me that the legislature did not purport to include seizures. Such a fundamental alteration of the common law would have to be expressed in clear terminology. (para. 24)

20. Counsel further relies on *Re Mitchell* (BC EST #D314/97) in which the Tribunal quoted the Minister of Labour during the 1995 debates of the Legislative Assembly:

The act [sic] is unchanged. It simply provides that where a business or a part of it is sold and the employees of that business are retained by the new employer, for their purposes, their years of service and vacation entitlements are maintained. [emphasis added]

21. Counsel submits that, no matter how broadly the word “dispose” is interpreted, it cannot be intended to cover an involuntary loss of the business through seizure by a creditor. She submits that Ventures did not dispose of its business; rather, the assets were taken from it to satisfy its obligations to its creditors.
22. She also submits that the delegate erred in finding that Ms. Bestard’s employment did not have to be continued by Ms. MacDonald in order for s. 97 to apply. She submits that Ms. Bestard’s employment ceased on February 4, 2004, as of the time the assets were seized.
23. Counsel for the Director argues that section 97 must be interpreted with the purposes of the *Act* in mind. She submits that section 97 acts to protect employees wage, vacation and compensation for length of service levels earned in their previous employment.
24. She contends that, in the absence of any statutory definition of the word *disposition*, the delegate correctly looked at the *Interpretation Act*, which defines dispose as “transfer by any method”. She also notes that the definition is both broad and inclusive. She submits that a purposive interpretation of section 97’s use

of the phrase “disposed of” must include the seizure of assets where those assets constitute all of a business or a substantial part of the entire assets of a business, and that the title of section 97 cannot be given any weight in light of section 11(1) of the *Interpretation Act*.

25. Further, counsel submits that the *Act* does not require that the disposition be voluntary or active, and that such terminology cannot not be read into the section. In the alternative, she submits that a voluntary disposition took place when Ventures pledged the assets under the GSA to secure the loan.
26. Counsel for the Director relies on *GMAC Commercial Credit Corp. – Canada v. T.C.T. Logistics Inc.* [2004] O.J. No. 1353 where the Ontario Court of Appeal found that an interim receiver of a business in bankruptcy was liable as a successor employer under Ontario’s *Labour Relations Act*.

ANALYSIS AND DECISION

27. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination;
or
 - (c) evidence has become available that was not available at the time the determination was being made
28. The burden is on an appellant to persuade the Tribunal that the delegate erred in law. I am unable to find that the appellant has discharged that burden.

29. Section 97 of the *Act* provides as follows:

Sale of business or assets

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.

30. The delegate interpreted s. 97 to include the seizure of a business by a creditor. In the facts of this case, I am not persuaded that this interpretation was in error.
31. The *Employment Standards Act* is remedial legislation, and as such, must be given such large and liberal interpretation as best ensure the attainment of its objects. (see section 8 of the *Interpretation Act*, *Machtinger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491) and *Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27)
32. Section 11 of the *Interpretation Act* provides that a head note to a provision or a reference after the end of a section or other division
- (a) is not part of the enactment, and
 - (b) must be considered to have been added editorially for convenience of reference only.

33. The object of the *Act* is to protect the interests of as many employees as possible (see *Rizzo*) and to provide protection to employees for the payment of their wages.

34. Although all previous Tribunal decisions on the interpretation of s. 97 relate to the purchase and sale of a business or its assets, in *Re Mitchell* (BC EST #D314/97, # RD108/98) the Reconsideration panel said:

We note that the language of section 97 is broad in scope. Although it is natural to speak of section 97 in relation to the “sale” of a business, it is the word “disposed” that is used in the legislation. Section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 defines “dispose” as follows:

“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 point we wish to make is that the language of section 97 is broad enough to include any disposition that results in a change in the legal identity of the employer...

35. Although Ms. MacDonald exercised her rights under a loan guarantee, the guarantee did not suggest there would be a seizure of a business as a going concern. In fact, Ms. MacDonald, through her operating corporation Fly By Night, continued the business uninterrupted. None of the employees, with the exception of Ms. Bestard, were terminated. The business continued to operate in the same location and under the same name.

36. The cases, as well as Tribunal jurisprudence, suggest that s. 97 applies to any successor who takes over the operation of the business whether by purchase, bankruptcy or seizure under a secured instrument.

37. When a secured creditor takes over a business and retains the employees of the business while continuing to operate it, her position is tantamount to a purchaser. In my view, the statutory rights of employees should not be jeopardized, particularly where the transaction has little, if any, impact on the business to which the employee has provided her services.

ORDER

38. I confirm that part of the delegate’s Determination finding that Ms. MacDonald’s seizure of assets pursuant to a loan guarantee, and her immediate continuation of the business constitutes a disposal within s. 97 of the *Act*.

Carol L. Roberts
Member
Employment Standards Tribunal