

BC EST #D207/99

EMPLOYMENT STANDARDS TRIBUNAL

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

Employment Standards Act, R.S.B.C. 1996, C. 113

- by -

Allan Russell dba Sea Our Fish (associated with Winston MacDonald)
(" Russell")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE NO.: 98/664

DATE OF HEARING: March 31, 1999

DATE OF DECISION: May 19, 1999

DECISION

APPEARANCES

| | |
|------------------|------------------|
| Brenda Bitten, | in person |
| Allan Russell, | in person |
| Robert Morrison, | for the Director |

OVERVIEW

This is an appeal by Allan Russell (“Russell”) of a Determination dated January 14, 1999, where the Director’s Delegate found that Russell was an employer and bound to pay the wages of two employees, Brenda Bitten and Oscar Glover. Mr Russell sold or transferred the business to Lori MacDonald on or about May 1, 1996. Apparently Ms. MacDonald purchased the business for operation by her father, Winston MacDonald. At the time of transfer Ms. Bitten was an employee. She was not terminated prior to the sale of the business, and she was not paid wages by MacDonald. Her claim against Russell was settled by the Director’s delegate during an adjournment following the hearing of evidence. Glover was employed by Mr. MacDonald after the sale of the business or the transfer of the assets. Glover was paid only a portion of the wages to which he was entitled by MacDonald. Russell took back the business as a result of MacDonald’s failure to make a payment on account of the business. The Delegate found that Russell was associated with Winston MacDonald pursuant to s. 95 of the *Act* in the operation of Sea Our Fish.

ISSUE TO BE DECIDED

Was the Russell responsible to pay the wages of Mr. Glover, during the period of time he worked in the business owned or operated by Mr. MacDonald?

FACTS

In this proceeding there were two complaints. After the hearing of evidence the Director’s delegate met with Brenda Bitten and the employer. After this meeting I was advised that the parties had settled the complaint and the appeal, and therefore I cancel the Determination in respect of Brenda Bitten.

Brenda Bitten was employed by Russell at the Sea Our Fish store in Union Bay British Columbia. This store sold fish and chips as well as fish products. Mr. Russell sold the business to Winston MacDonald on or about May 1, 1998, pursuant to an agreement in writing. It is obvious that this agreement was not drafted by a lawyer. The agreement fails to address the many risks which should be addressed in an asset sale agreement.

After the sale, MacDonald employed Oscar Glover from May 4 to May 25, 1998 at the Sea Our Fish store. Winston MacDonald failed to complete the terms of sale of the business. His daughter, Lori MacDonald was to pay Russell the sum of \$2,000 and failed to do so. As a result, on or about June 1, 1996 Mr. Russell cancelled the sale contract and took over the business. At the time Mr. Russell renewed his operation of the business, wages were due and owing to Brenda Bitten and Oscar Glover. Mr. MacDonald has apparently gone bankrupt. He apparently received the proceeds from operating the business during May, but did not apply these proceeds to the payment of accounts or payroll.

It appears that Mr. Russell regrets not having taken the necessary care and due diligence involved in the sale of the business to MacDonald.

Although Mr. Glover did not appear at the hearing, there was evidence from Ms. Bitten that he was an employee of Sea Our Fish, when the business was operated by MacDonald, and was unpaid. This point was not challenged. The Delegate calculated that the amount of wages due and owing to Mr. Glover was \$1,610.23, plus interest.

The Delegate found that Russell and MacDonald were associated pursuant to section 95 of the *Act* in the carrying on of business during the month of May of 1998.

ANALYSIS

It is apparent that Mr. Russell sold, or attempted to sell his business to MacDonald, permitted MacDonald to operate the business for one month, and assumed control over the business at the end of the month because MacDonald failed to complete the terms of sale of the business. In my view Mr. Russell is liable for the payment of Glover's wages by virtue of the definition of employer in section one of the *Act*, or by virtue of section 97 of the *Act*.

While the Delegate found that Mr. Russell never did sell the business to MacDonald, it is clear that there was a transfer of the possession of the assets to MacDonald. It appears to me that there may well have been a transfer of ownership of the business assets, but it is not necessary for me to review the findings of the Delegate with regard to the "ownership" of the business during May of 1998. If Russell remained the owner of the business during the month of June 1998, MacDonald operated the business with the consent of Russell. It is clear that Russell did not have direction and control over Glover during the month of May. It is also clear, that but for the conduct of Mr. Russell in permitting Mr. MacDonald to use the assets of the business, Mr. MacDonald would not have had the ability to have Mr. Glover engage in work for Seafoods. By

virtue of the definition of employer set out in the *Act*, Russell is the employer of MacDonald as he was indirectly responsible for the employment of Glover:

“Employer” includes a person

- (a) who had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee

If the business was transferred from Mr. Russell to Mr. MacDonald, and then back to Mr. Russell, this transaction is caught by section 97 of the *Act*.

Section 97 of the *Act* provides that the employment of an employee is continued upon the sale of a business:

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.

It appears that all the assets of the business were transferred from Russell to MacDonald, and then back to Russell.

The Delegate found that Mr. Glover was an employee of the business. The Delegate found that Oscar Glover was owed wages. While Mr. Glover was not an employee of the business at the time when Russell sold the business to MacDonald, he was an employee at the time that Russell took over the business.

I have no hesitation in concluding that Mr. Russell is liable to Mr. Glover for his wages, by application of s. 97 of the *Act*, or alternatively by finding that Glover was an employee of Russell. I would have found similarly in regards to Ms. Bitten, however, the parties settled the dispute following the hearing of evidence, during the brief adjournment before submissions with the assistance of Mr. Morrison.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated January 14, 1999 be confirmed, in respect of Oscar Glover and cancelled in respect of Brenda Bitten.

Paul E. Love
Adjudicator
Employment Standards Tribunal