

An appeal

- by -

Harlan Fairbanks Co. Ltd.
("Harlan")

- 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: John M. Orr

FILE No.: 2002/055

DATE OF DECISION: May 23, 2002

DECISION

OVERVIEW

This is an appeal by Harlan Fairbanks Co. Ltd (“Harlan”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from a Determination dated January 10, 2002 by the Director of Employment Standards (the “Director”).

In the exercise of its authority under section 107 of the *Act*, the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

Harlan operated a food processing and distribution business. The Director determined that Harlan owed compensation for length of service to an employee, Adolphus Jemmott (“Jemmott”) because he was not given written notice of termination. Harlan has appealed on the grounds that the requirement for written notice is unfair but in the appeal it is also submitted that Harlan sold all of its assets to another company Que Pasa Mexican Foods (“Que Pasa”) and that Jemmott was immediately employed at Que Pasa. The Director did not consider the application of Section 97 of the Act.

ISSUES

There are two issues in this case: firstly, whether the delegate was correct in finding that written notice was required to discharge the employer’s liability for compensation for length of service; Secondly, whether the Director should have considered the application of section 97.

ANALYSIS

I will not analyse extensively the first issue in this case except to say the jurisprudence in this area is very clear that “written” notice is required to discharge the employer’s liability for compensation for length of service. To this extent I concur with the Director’s analysis and would confirm the determination but for the second issue in this case.

It appears to have been known to the Director’s Delegate that Harlan had sold its assets to Que Pasa. Harlan set out in some detail the restructuring of the business and the sale of the assets. It appears that Jemmott and other employees continued to work for the new owners. It appears that they are still employed by the new owners. Section 97 of the Act provides that:

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.

In the reconsideration decision Re: *Director of Employment Standards (Primadonna Ristorante Italiano)*, BC EST # RD046/01 the Tribunal reviewed the law in relation to the application of this section in particular in relation to the application of section 63 - compensation for length of service. I do not find it necessary to set out the details of that decision except perhaps to refer to a quotation from a previous decision applied therein by the Tribunal:

In our view, the plain meaning of section 97 is that where there is disposition of a business, section 97 deems employment to be continuous and uninterrupted for the purposes of the Act. If an employee is not terminated by the vendor employer prior to or at the time of the disposition, then for the purposes of the Act, the employment of the employee is deemed to be continuous...

The deeming of employment to be continuous and uninterrupted is triggered by the fact of disposition, not by the decision of an employee to continue unemployment with the purchaser employer.

Section 97 is triggered when there is a sale of business assets and no concomitant termination of employment prior to the completion of the sale.

The essential principle applied in *Primadonna* is that if the employment is deemed to be continuous and uninterrupted the liability for compensation becomes the liability of the successor employer. Under certain circumstances Harlan may not have been liable to pay compensation to the employees and therefore the issue of written or verbal notice would be irrelevant. If there was no written notice then the employment may not have been terminated by Harlan and was therefore uninterrupted and deemed to continue with the new owner.

In this case the investigation does not reveal the Director's findings in regard to the transfer of ownership of the business and whether section 97 applied. There is not sufficient information before me to make that decision. Therefore this matter will be referred back to the Director for investigation and determination in relation to the application of section 97 and the associated jurisprudence.

As this is a completely new issue I do not consider myself seized of this matter.

ORDER

I order, under section 115 of the *Act*, that this matter is referred back to the Director for reinvestigation in particular in relation to the application of section 97.

John M. Orr
Adjudicator
Employment Standards Tribunal