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 -

Jax Compton Store (1977) Ltd.
("Jax")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 1999/225

DATE OF DECISION: June 25, 1999

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Jax Compton Store (1977) Ltd ("Jax") of a Determination which was issued on April 6, 1999 by a delegate of the Director of Employment Standards (the "Director"). In that Determination, the Director found that three former employees of Jax, Karen Bennie, Stefan Nowoskiecski and Scott Morgan (collectively, the "employees"), were entitled to length of service compensation in an amount of $7252.69.

Jax says this conclusion is wrong because the employment of the employees, as a matter of law under the *Act*, ought to have been deemed continuous and uninterrupted by reason of a sale of all part of the business or a substantial part of the entire assets of Jax.

The Tribunal has decided an oral hearing is not necessary to address the issue raised in this appeal.

ISSUES TO BE DECIDED

The issue in this appeal is whether Jax has shown the decision of the Director was wrong in law or in fact.

FACTS

I accept the following facts:

1. On or about November 30, 1998, the owners of Jax notified their creditors of their inability to meet the credit obligations of Jax and of their intention to close the business and possibly petition the business into bankruptcy.

2. On December 6, 1998, Darrel and Wendy Van Os, the owners of Jax, held a meeting with the employees of Jax and notified them of their intention to close the business. They also notified the employees that their employment was being terminated. The Record of Employment issued to the employees shows the last day of work as either December 6 or December 7, 1998.

3. Two of the creditors of Jax, Ron and Linda Otte, attended the meeting. Mr. and Mrs. Van Os had purchased Jax from Mr. and Mrs. Otte in 1993. Mr. and Mrs. Otte filed a submission on the appeal, in which they said:

> December 5 we were told by telephone that on the 7th the Van Os's were having a meeting with their staff to tell them the plans to close the store. We asked to talk with the staff after they informed them of the closure. At this time we told the staff that we didn't know when or if the store would be reopened and if they were interested in employment they should submit an application, that we were not taking over the liabilities of Jax Compton Store (1977) Ltd. They were also told to apply for EI.
>
> After much debate, we finally reached an agreement with the Van Os's. We were to pay them $5000.00 . . . plus we had to pay out the bank to keep the stock and fixtures.

With their submission, Mr. and Mrs. Otte filed three documents relating to their re-acquisition of Jax. One of the documents, from Mr. and Mrs. Otte's lawyers to Mr. and Mrs. Van Os, dated December 17, 1998, stated:

> I am instructed that you have agreed to transfer the store, equipment and inventory to my client in return for consideration of a payment of $5,000.00 and a release from your debt to my client.
>
> . . . my client has instructed me to prepare an agreement to reflect this. I therefore enclose an original and one copy of an agreement for your approval.

4. The employees filed a submission on the appeal and spoke of the December 6, 1998 meeting:

> . . . Ron and Linda Otte were unsure if they were even going to be able to reacquire the store or if it would remain empty until foreclosure proceedings were finished, which could have taken several months. We were not guaranteed jobs if they were able to get the store back.

5. In addition to the appeal, Jax filed a written submission dated May 19, 1999, which included part of the agreement referred to in paragraph 3.

6. The disposition of the business was completed on December 22, 1998. The business re-opened on or about December 23, 1998 and the employees were hired to that business.

ANALYSIS

Section 97 of the *Act* 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 by the disposition.*

The Tribunal did a comprehensive analysis of that provision in *Lari Mitchel and others*, BC EST #D107/98 (Reconsideration of BC EST #D314/97)(application for judicial review dismissed). The following comments from that decision are relevant to this appeal:

> In our view, the plain meaning of section 97 is that where there is a 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 the disposition, not by the decision of an employee to continue employment with the purchaser employer.
> (page 22)

The Tribunal also noted in the decision that the word "disposed" in Section 97 takes its meaning from the definition of *"dispose"* in Section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238:

> *"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;*

Jax has not shown that any disposition of the business or part of it or a substantial part of its entire assets had occurred prior to the termination of the employees. The first evidence of any disposition is contained in the letter of December 17, 1998 from the lawyer for Mr. and Mrs. Otte to Mr. and Mrs. Van Os confirming the fact of an agreement and forwarding the documentation supporting it. More specifically, there is nothing in the material or the appeal indicating that any disposition occurred prior to or at the time the employees were terminated. As indicated in the comments from *Lari Mitchell and others, supra*, it is the fact of a disposition that triggers the deeming provisions of Section 97. The failure of Jax to show a disposition had occurred prior to or at the time of the disposition is fatal to the appeal.

Jax has not shown that the decision of the Director is wrong and the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 6, 1999 be confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal