

**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 -

550635 B.C. Ltd.  
operating as Jack's Towing  
("Jack's Towing")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Ib S. Petersen  
**FILE NO.:** 1999/216  
**DATE OF DECISION:** July 8, 1999



business take with them all their accumulated rights relating to increased vacation pay and notice periods or compensation required to be paid under Section 63 of the Act. Their employment is deemed to be continuous and uninterrupted *even in the case where it is interrupted*.

The Determination also contains a "\$0.00" penalty for the contravention of Section 63.

### **ISSUE TO BE DECIDED**

The Employer takes issue with the Determination. The basis for the appeal is that the delegate's decision is inconsistent with the decision of the Tribunal in *Lari Mitchell*, BCEST #D314/97, upheld in part on reconsideration in BCEST D107/98. The Employer says that Section 97 applies "unless appropriate arrangements are made so that the employment of such persons is terminated on or before the asset sale is completed". The employees were terminated by the vendor employer and given notice.

### **ANALYSIS**

It is trite law that the appellant has the burden to show that the Determination is wrong.

Section 97 of the *Act* provides:

97. If all or part of a business or 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.

A leading case with respect to Section 97 is *Lari Mitchell*, *above*. In that case the original three person panel of the Tribunal noted, at pages 6 and 7:

"... However, unless appropriate arrangements are made so that the employment of such persons is terminated on or before the asset sale is completed, those employees continue on as employees of the asset purchaser and retain all of their existing rights and obligations

...

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. In such circumstances, the employees' existing rights under the *Act* are merely transferred from the asset vendor (their former employer) to the asset purchaser (their new employer). If, prior to the sale, the asset vendor terminates the employees' (say, as a condition of the sale agreement), the employees may then only assert their rights under the *Act* as against the asset vendor."

The reconsideration panel agreed with this analysis.

I agree with the above. In this case the employees were terminated prior to the sale. They were given notice under the *Act* and they do not have claim against their new employer. In my view, the delegate erred in law when he found that the termination of the employment relationship of Wear and Markus was unaffected by the termination by their previous employer.

In his submission to the Tribunal, the delegate makes reference to the judicial review decision in the *Mitchell* case (*Mitchell et al. v. Director of Employment Standards et al.*, unreported, Victoria Registry, No. 981971 (B.C.S.C.)). The delegate argues that decision is consistent with the Determination. I respectfully disagree. The Court upheld the reconsideration panel's decision and noted with reference to Section 97, at page 21:

"I conclude that s.97 must be interpreted to mean that if employees are employed by a vendor at the time a business is disposed of then, for the purposes of the *Act*, the employment of those employees is deemed to be continuous with the successor employer. In short, nothing has changed and all the benefits of these employees are continued with the new employer. Their employment is continuous and it cannot be said to have been terminated."

In the result, the Determination must be set aside.

Having found that the Employer did not contravene Section 63, I set aside the penalty as well. Even if I am wrong in that regard, I would still set aside the penalty part of the Determination. This part of the Determination is little more than a "boiler plate" explanation of how the Director generally exercises her discretion and provides no analysis of why the delegate decided to exercise his discretion (see, for example, *Narang Farms and Processors Ltd.*, BC EST #D 482/98; *Paul Skalenda operating as Fine Line Traffic Marking et al.*, BC EST #D 196/99).

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determinations in this matter, dated March 24, 1999 be cancelled.

**Ib Skov Petersen  
Adjudicator  
Employment Standards Tribunal**