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 -

Murray Lerner Operating as St. Louis Grill
(“ Lerner ”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/219

DATE OF HEARING: July 5, 2000

DATE OF DECISION: July 24, 2000

DECISION

APPEARANCES

for the Appellant	Al Strachan
for the individuals	Myra Orton (on her own behalf)
For the Director	Ed Wall

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Murray Lerner operating as St. Louis Grill ("Lerner") of a Determination that was issued on March 9, 2000 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Lerner had acquired the business of the Michex Restaurant (the "Michex") and, under Section 97 of the *Act*, had assumed the duties and obligations under the *Act* for the employment of the complainants, Scott Rein ("Rein), Cameron Bobick ("Bobick") and Myra Orton ("Orton"), and had contravened the *Act* in respect of that employment. The Director ordered Lerner to cease contravening and to comply with the *Act* and to pay an amount of $2788.00. The Director also imposed a zero dollar ($0.00) penalty against Lerner.

The Determination noted that Colleen Durning ("Durning") was, at all times material to the complaints, the owner of the Michex and the employer of the complainants. Durning was not included in the Determination nor has any Determination been issued against her.

Lerner disputes the conclusion that he should be responsible under the *Act* to the complainants.

ISSUES TO BE DECIDED

The issue here is whether, by operation of Section 97 of the *Act*, Lerner assumed the duties for the obligations of Durning under the *Act* and to the complainants.

FACTS

The Determination is essentially comprised of two parts. The first part addresses the validity of the complainants' claims for unpaid wages, length of service compensation, annual holiday pay and statutory holiday pay. It noted that "Colleen Durning (Durning), who was the employer at the material times, agrees wages are owing". The Director concluded wages were owed to each of the complainants. Lerner has taken no issue with any aspect of this part of the Determination, adding that he has no ability to do so as he had no employment records for any of the persons employed at the Michex for the period of time relevant to the complaints.

The second part of the Determination addressed the liability of Lerner for the wages owed. The Determination provided the following background information:

> The employer [Lerner] operates a restaurant known as the St. Louis Grill. He acquired the assets of this business from Ron Smithers, who also owns the building. Smithers acquired the assets from Colleen Durning, who defaulted on her lease payments.

Under the analysis relating to the second part of the Determination, the Director made the following assertions:

> The employer named above never employed the complainants and had little or no relationship whatsoever with them. The extent of the employer's interaction with these complainants was to discuss their employment at the St. Louis Grill. They were not hired, although they were interviewed by the current owner.
>
> Section 97 of the Act states:
>
> *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.*
>
> While Durning was in complainant (sic) control of the business, it was named Michex Restaurant. Lerner acquired it and renamed it St. Louis Grill, but the business and the assets are the same ones Durning controlled.

The Michex closed its doors on December 18, 1999. The lease between Lerner and the owner of the building in which the Michex had been located, Ron Smithers, was signed on December 28, 1999. The St. Louis Grill opened its doors on January 15, 2000. What is absent in the Determination is any conclusion about what point in time the disposition between Durning and Learner was completed. I have more to say about that later.

ANALYSIS

Mr. Strachan, representing Lerner in this appeal, argued, first, that Lerner did not acquire any "business" from Durning. It was his position that the business Durning operated, the Michex, had closed, effectively ceasing to exist. Lerner only leased the same premises and acquired some of the same assets used by Durning at the Michex from the owner of the property and the assets, Ron Smithers. Alternatively and in any event, Mr. Strachan argued that the employment of the complainants was terminated on or before December 18, 1999, when the Michex closed, and did not continue with Lerner. Lerner opened the St. Louis Grill on January 15, 2000.

The argument of the Director was that the business of the Michex was disposed of by Durning and acquired by Lerner. It was argued that the interval between the closing of the Michex and the opening of the St. Louis Grill does not affect the operation of Section 97 of the *Act*. What is relevant, according to the Director, is that employees from the Michex wanted to work at the St. Louis Grill, applied for employment there, were interviewed and the decision not to employ them there was made by Lerner. The Determination stated that argument as follows:

> The current policy of the Director of Employment Standards is that where the vendor of a business does not give written notice to its employees **and** the employees want to continue in employment, the purchaser assumes full liability for the employees' entitlements under the *Act*. This is the fact pattern in this case. Durning gave no written notice to her employees and they wanted to continue in employment (evidenced by the fact they interviewed for Lerner). Therefore, Lerner assumes full liability for the employee's entitlements under the Act.

Both Mr. Strachan and the Director rely on the Tribunal's decision *Lari Mitchell and others*, BC EST #D107/98 (Reconsideration of BC EST #D314/97) in support of their respective positions.

I will put aside for the moment any detailed consideration of whether there was, for the purposes of the *Act*, any disposition of "all or part of a business or substantial part of the entire assets of a business" between Durning and Lerner. I will make only one point about that issue. Accepting, for the sake of argument, that there was a disposition for the purposes of the *Act* in this case, there was no evidence that such disposition had occurred before December 18, 1999, the date that Durning closed the doors of the Michex.

In *Lari Mitchell and others, supra*, the Tribunal stated the following:

> 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 disposition*, not by the decision of an employee to continue employment with the purchaser employer.
>
> . . .
>
> Where the purchaser of the business refuses to continue the employment of employees *who are in the vendor's employ at the time of disposition*, then those employees are entitled to look to the purchaser to satisfy all claims under the *Act*, including claims for length of service compensation and, if applicable, group termination pay . . .
>
> (page 22; emphasis added)

I also note that the reconsideration panel in the *Lari Mitchell* case agreed, with some modification to the terminology, with the following comment of the original panel:

> 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.
>
> (page 6)

The Director argued that I should not consider the Michex had closed its business on December 18, 1999, but only that its business was "interrupted", by the closure. Quite apart from the inherent inconsistency in characterizing a permanent closure of a business as an interruption of that business, how I characterize the events of December 18, 1999 from the perspective of the "business" is not the relevant consideration. A business may be ongoing or idle at the time of disposition. What is important from the perspective of the *Act*, is that the employment rights of employees employed at the time of the disposition are recognized and given effect.

The Director also argued that in the absence of written notice of termination, the employees of the Michex would not have been considered terminated for a period of at least 13 weeks after Durning closed the doors on the Michex. With respect, that argument is not supported by any provision in the *Act*. This is not a matter arising under Section 63 of the *Act* where written notice of termination is a precondition to discharging the obligation to pay length of service compensation. Section 1 of the *Act* contains the following provision:

> ***"termination of employment"*** *includes a layoff other than a temporary layoff.*

That definition is inclusive. There is a myriad of circumstances where an employee might, for the purposes of the *Act*, be considered terminated. Only a few are contemplated by specific provisions in the *Act*. In Section 66, for example, the Director may consider an employee terminated when a condition of that employee's employment is substantially altered. For the most part, whether and when an employee has been terminated for the purposes of the *Act* is very much a question of fact in the particular circumstances.

A vendor employer is entitled to terminate its employees prior to a disposition. No statutory purpose is served by accepting that such termination, to be a valid termination in the context of Section 97, must be in writing. As indicated above, any dispute about whether and when an employee has been terminated is a question of fact. The evidence and the material on file point very strongly to a conclusion that Durning terminated the employment of the complainants no later than December 18, 1999, the date the Michex closed its doors. Their termination was prior to any alleged disposition. My conclusion might be different if the material showed the terminations were no more than a scheme by Lerner to avoid the effect of Section 97 the *Act*, but there is no such indication here. As the Tribunal indicated in the *Lari Mitchell* case:

> Where the vendor's employees continue to work for the purchaser, the purchaser is required to honour the employee's length of service with the vendor and to assume all of the vendor's liabilities and obligations toward the employees.
>
> (page 22)

However, if, as here, an employee is neither employed by the vendor employer at the time the business is disposed of nor continues to work for the purchaser, there is no rational basis for deeming that employment to be continuous and uninterrupted. The complainants were not employed by Durning past December 18, 1999 and, assuming there was a disposition at all, it occurred after that date. As the complainants were not employed by Durning at the time of disposition, their employment could not be deemed continuous and uninterrupted with Lerner and he never assumed any duties or obligations under the *Act* for any part of their employment with Durning. The appeal succeeds on that basis.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated March 9, 2000 be cancelled.

David B. Stevenson
Adjudicator
Employment Standards Tribunal