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-

Lari Mitchell and others
("Excluded Employees")

and
B.C. Government and Service Employees' Union
("BCGEU")

and
British Columbia Systems Corporation
("B.C. Systems")

and
Public Sector Employers' Council
("PSERC")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATORS:	Kenneth Wm. Thornicroft, Panel Chair Norma Edelman Niki Buchan
FILE NO.:	96/779
DATE OF HEARING:	June 17th, 1997
DATE OF DECISION:	July 25th, 1997

DECISION

APPEARANCES

George C.E. Fuller	for Lari Mitchell and others
Ken Curry	for B.C. Government Employees' Union
Susan P. Arnold	for British Columbia Systems Corporation
Peter A. Gall	for Public Sector Employers' Council
Catherine Hunt	for the Director of Employment Standards

INTRODUCTION

This matter involves several appeals all filed pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from Determination No. CDET 004908 issued by the Director of Employment Standards (the "Director") on December 9th, 1996. The Director determined that neither British Columbia Systems Corporation ("B.C. Systems") nor the Province of British Columbia had contravened either the individual or group termination provisions of the *Act* (sections 63 and 64, respectively).

According to the Reason Schedule appended to the Determination, 84 former employees of B.C. Systems filed complaints under the *Act* alleging that they were entitled to individual and/or group termination pay. Following an investigation, the Director determined that the group termination provisions of the *Act* (*i.e.*, section 64) were not applicable because, *inter alia*, the statutory threshold requiring that 50 employees be terminated within a given two-month period had not been satisfied. As for the individual claims for compensation for length of service (section 63), the Director determined that each of the complainant employees received appropriate statutory written notice of termination or an equivalent amount of severance pay (or some combination of notice and severance pay) and, therefore, were not entitled to any individual termination pay.

There are a number of issues that arise as a result of the various appeals that have been filed with respect to the Determination. Accordingly, a pre-hearing conference was held, by telephone conference call, with the parties' respective legal counsel on June 10th, 1997. At the conclusion of the pre-hearing conference, and with consent of the parties, the Tribunal ordered that an issue raised by the appellants B.C. Systems and the Province of British Columbia (the latter being represented in these proceedings by the Public Sector Employers' Council or "PSERC") should be set down for a separate hearing. This particular issue is whether or not the Director's interpretation of section 97 of the *Act* (set out at pages 5 through 11 of the Reason Schedule appended to the Determination) was correct. A hearing was convened in Victoria on June 17th, 1997 to hear the parties' submissions on this matter. The Tribunal panel wishes to record at the

outset its appreciation for the excellent oral and written submissions that we received from all counsel of record.

Section 97 of the *Act*, sometimes referred to as a "nonunion successorship provision", addresses the employment status of employees when their employer's business, or the employer's business assets, are sold or otherwise transferred to a third party. The following reasons deal only with the Director's interpretation of section 97 of the *Act*, although in the course of addressing this issue, we will also touch on, as did the Director, certain other related provisions of the *Act* that may arise in a "section 97" case, such as section 95 (associated corporations) and section 65(1)(f) [offer of reasonable alternative employment].

FACTS

By way of brief background, the present appeal proceedings arise out of a restructuring of B.C. Systems that was first announced by the provincial government in the fall of 1995. In essence, a number of B.C. Systems employees were transferred from that crown corporation to the B.C. government payroll while a number of other employees either resigned after having been given financial incentives to do so, took early retirement, or were terminated with severance pay.

Some employees involved in the present appeals were members of a bargaining unit for which the B.C. Government and Service Employees' Union ("BCGEU") was the certified bargaining agent. This group of employees has been referred to in the Determination and during the first phase of the appeal hearing as the "included employees". Another discrete group of appellant employees--33 in total--were not included in the BCGEU bargaining unit; these employees ("Lari Mitchell and others") have been referred to as the "excluded employees".

According to the Reason Schedule appended to the Determination (and so far as we are aware these facts are not in dispute), during the period December 1995 to March 1996, 1,011 employees of B.C. Systems were transferred from B.C. Systems' to the provincial government's payroll. These employees were offered, and accepted, essentially identical positions with the government. However, some 58 former B.C. Systems employees refused to accept a transfer to the provincial government--these employees comprise two distinct groups.

The first group, 21 in number, gave advance notice of their intended refusal to accept any transfer and instead opted to resign with severance pay as set out in the BCGEU collective agreement; these employees resigned pursuant to a program known as the "Advance Notice of Intention to Refuse Transfer to Government" program. The second group, 37 in number, only refused the transfer when an actual position was offered to them (*i.e.,* there was no advance "opting out" of the proposed transfer).

The issue with respect to these latter two groups of employees was put as follows by the Director in the Determination (p. 10):

> "By refusing to transfer to similar positions with government, did these employees effectively quit, or did they have the right under the Act to refuse a transfer and be treated as a terminated employee?"

DIRECTOR'S DETERMINATION: SS. 97 [Sale of Business Assets] & 65(1)(f) [Offer of Reasonable Alternative Employment]

Relying on a previous B.C. Court of Appeal decision generally known as the *Verrin* case [*B.C.G.E.U. v. Industrial Relations Council* (1988) 33 B.C.L.R. (2d) 1], the Director held that "employees who refused transfer may be 'terminated' employees for the purpose of group termination" (see p. 11 of the Determination).

The Director also held that the provincial government could not avoid its liability for individual or group termination pay by reason of section 65(1)(f) of the *Act* because, in the circumstances, any offer of reasonable alternative employment was made by the provincial government, a party who was not "the employer". In the Director's view, the section 65(1)(f) defence could only be raised if B.C. Systems, rather than the provincial government, made the "reasonable alternative employment" offer (although the Director went on to hold that B.C. Systems and the provincial government were "associated" firms within section 95 of the *Act*).

ISSUE TO BE DECIDED

Although all of the appellant employees' complaints were ultimately dismissed, the provincial government challenges the Director's interpretation of section 97 of the *Act.* Specifically, the provincial government (as well as B.C. Systems) says that the Director erred in asserting that employees who refused to accept a transfer from B.C. Systems to the provincial government were, in effect, terminated and, therefore, entitled, *prima facie*, to the benefit of section 63 (compensation for length of service) and, if applicable, section 64 (group termination pay) of the *Act.*

The Director's position was supported on the appeal hearing by, principally, counsel for the excluded employees, as well as counsel for the BCGEU employees.

ANALYSIS AND FINDINGS

Section 97 of the *Act* provides as follows:

> **Sale of business or assets**
>
> 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.

This provision is sometimes referred to as a "successorship" provision in that it purports to create some ongoing employment rights for employees who continue to work for the new or "successor" employer following an asset sale. It should be noted that the employment issues that are addressed by section 97 are moot in the case of a "sale of business" by way of a share transfer. In the latter case, the employment contract remains undisturbed by the sale--the employees continue to be employed by the same employer albeit under circumstances where the control of their employer has been transferred from the share vendor to the share purchaser.

Section 97 of the *Act* is conceptually similar, though narrower in scope, to what is now section 35 of the B.C. *Labour Relations Code*, the legislative provision at issue in the *Verrin* case. In the latter case, the operations of a Victoria area laundry service were transferred from the Ministry of Health to a newly incorporated society. The B.C. Labour Relations Board held that the Society was a successor employer. Mr. Verrin, who was a laundry truck driver, filed a grievance following his refusal to accept a new position with the successor employer alleging that he had been "laid off" as defined in the Ministry of Health collective agreement. A grievance arbitrator ruled that Verrin had not been laid off. The union appealed to the Labour Relations Board (later renamed the Industrial Relations Council) who initially set aside the arbitrator's decision but on reconsideration confirmed the arbitrator's decision.

In turn, a judicial review application was filed and Mr. Justice Shaw of the B.C. Supreme Court quashed the Industrial Relations Council's decision. On further appeal to the B.C. Court of Appeal, that court held, 2-1, that the successorship provision did not, of itself, create an employment relationship between Verrin and the successor employer. The majority (Anderson and Hutcheon, JJ.A.) stated, at pp. 22-23:

> "If one examines these provisions in their most favourable light insofar as the government is concerned they cannot be interpreted so as to make Verrin an employee of the purchaser. There is no logical or rational basis for holding that Verrin ceased to be an employee of the government or that he ever became an employee of the purchaser...
>
> When Verrin became an employee of the government both he and the government became bound by the provisions of the collective agreement...When the business was sold the purchaser became subject to the terms of the collective agreement...The employees of the purchaser also became bound in their relations with the purchaser by the terms of the collective agreement. Verrin never became an employee of the purchaser and hence he never had any contractual relationship with the purchaser. His only contractual relationship was with the government...The statute may, in a sense, have provided for the assignment of the collective agreement from the government to the purchaser. It did not provide for the assignment of the employees from the government to the purchaser.
>
> Both the arbitrator's decision and the decision of the council are founded on the proposition that Verrin continued to be employed and, therefore, his employment was not terminated within the meaning of the collective agreement. As Verrin was

> never employed by the purchaser, he did not become subject to any relationship with the purchaser. His relationship was with the government only and he had the right to grieve pursuant to the collective agreement that the government had wrongly attempted to terminate his employment.
>
> *The only way that the interpretation placed by the arbitrator and council on* [the successorship provision] *can be upheld is to assume that the arbitrator had the legislative power to amend* [the successorship provision] *by adding the following words to the section: 'and the employees of the former owner of the business shall become the employees of the purchaser, lessee or transferee'...*
>
> *Assuming for the purposes of argument that there are compelling policy reasons for making the employees of the former owner the employees of the purchaser, these policy reasons and their resolution are for the consideration of the legislature and not the arbitrator or the council.*" (italics added)

The Court of Appeal held that the successorship provision contained in the *Labour Relations Code* did not create an "automatic" ongoing employment relationship between the employees of the former employer and the successor employer. The employees of the predecessor firm are not obliged to continue their employment with the successor firm, although, if they wish to continue their employment, the provisions of the collective bargaining agreement (which, by reason of the successorship declaration, binds the successor employer) may give them the right to continue as employees of the successor firm.

However, in our view, the language of section 97 of the *Act* does create the very sort of ongoing employment relationship referred to by the Court of Appeal in *Verrin* (see the italicized portion of the above excerpt from *Verrin*). Section 97 explicitly states that upon the asset sale "the employment of an employee of the business is deemed, for the purposes of the *Act*, to be continuous and uninterrupted".

In other words, under the *Act*, employees are presumptively treated the same whether or not the business is sold via a sale of shares or assets--in either case the sale, *per se*, does not terminate the underlying employment relationships. Section 97 is triggered so long as the individual in question is an "employee of the business" as at the date of the asset sale. The asset sale itself does not terminate the employment relationship; the employment relationship merely continues with the asset purchaser being, in effect, substituted for the asset vendor as the employer of record. This is not to say that the asset purchaser *must* continue to employ all of the employees of the asset vendor. 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, but only insofar as the *Act* is concerned, vis-à-vis the asset purchaser (*i.e.*, their new employer)--see *Helping Hands Agency Ltd. v. B.C. Director of Employment Standards* (1995) 15 B.C.L.R. (3d) 217 (B.C.C.A.).

Thus, in the case of an asset purchase, the purchaser could require, as a condition of sale, that the asset vendor ensure that some or all of the employees of the business are terminated in accordance with section 63 and, if applicable, section 64, of the *Act*--usually, this would require the asset vendor to give the employees in question appropriate written notice of termination or pay in lieu thereof, or some combination of pay and notice. However, if some or all of the asset vendor's employees were not terminated prior to the completion of the sale, those employees would continue on as employees of the asset purchaser and could enforce all of their existing rights and obligations under the *Act* as against the asset purchaser.

Of course, the employees of the asset vendor, assuming they have not otherwise quit or been terminated, are not obliged to continue to be employed by the asset purchaser. However, if they refuse to continue on with the asset purchaser, then they have, in effect, voluntarily quit and are not entitled to claim termination pay [see section 63(3)(c) of the *Act*] nor would they be eligible for group termination pay under section 64. If the employees of the asset vendor have not resigned or been terminated prior to the completion of the sale, their employment continues on and, therefore, if the asset purchaser wishes to terminate their employment, or refuses to allow such employees to continue to be employed by the asset purchaser, the asset purchaser will be liable for termination pay under sections 63 and, if applicable, section 64 of the *Act* subject to any applicable statutory defences.

Counsel for the "excluded employees" submits that section 97 of the *Act* ought to be construed narrowly; that its purpose is only to preserve certain service-based benefits (such as vacation pay and compensation for length of service) in the case of a sale of a business. However, while predecessor provisions to section 97 were narrow in scope (*e.g.,* s. 8 of the *Annual Holidays Act,* R.S.B.C. 1960, c. 11), that is no longer the case. Section 97 states that the employment is deemed to be continuous for all purposes of the *Act,* not merely for some provisions of the *Act.*

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.

There may be cases where the asset vendor purports to terminate the employees prior to the asset sale but refuses to pay compensation for length of service, or to give proper written notice, because the employee has refused a new offer of employment with the asset purchaser. In our view, and in those circumstances, the vendor employer would not be able to avoid liability by reason of section 65(1)(f) of the *Act,* because the offer of employment would have been made by a third party. We agree with the Director that section 65(1)(f) of the *Act* is intended to create a defence only in circumstances where the *current employer* has made an offer of reasonable alternative employment which was not accepted by the employee. On the other hand, if the "third party employer" could be characterized as one and the same as the current employer (say, by reason of a section 95 designation), the section 65(1)(f) defence would govern.

Situations may also arise where an employee, or group of employees, continues to be employed by the asset purchaser but under substantially less beneficial terms and conditions which were unilaterally imposed by the new employer. In such circumstances, there may be a constructive dismissal in which case the new employer would be liable for termination pay (subject to any applicable statutory defences) by reason of section 66 of the *Act.*

CONCLUSIONS AND ORDERS

For the reasons set out above, we are of the view that the Director's interpretation of section 97 of the *Act,* as set out at pages 9 through 11 of the Determination, is incorrect. Accordingly, pursuant to section 115(1)(a) of the *Act,* that aspect of the Director's Determination is cancelled.

We agree with the Director's view, set out at page 11 of the Determination, that section 65(1)(f) of the *Act* can only be raised as a defence where the "reasonable alternative employment" offer is made by the current employer or by an "associated employer" as defined in section 95 of the *Act.* Accordingly, that aspect of the Director's Determination is confirmed.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal

Norma Edelman, *Registrar*
Employment Standards Tribunal

Niki Buchan, *Adjudicator*
Employment Standards Tribunal