

**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-

Abacus Travel (1996) Inc.  
(the "Appellant")

-of a Determination issued by-

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** E. Casey McCabe

**FILE NO.:** 1999/113

**DATE OF DECISION:** July 28, 1999

**DECISION**

**APPEARANCES**

Karin Bye	for the appellant
Lesa Mollinga	for herself
No one	for the Director of Employment Standards

**OVERVIEW**

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) from a Determination dated February 2, 1999. That Determination found that the complainant, Lesa Mollinga, was entitled to compensation pursuant to Sections 58 and 63 of the *Act*.

**ISSUE(S) TO BE DECIDED**

1. Does Section 97 of the *Act* apply to the sale of a business in the facts of this case?
2. Does an indemnification agreement pursuant to a sale of a business relieve the purchaser from obligations under Sections 58 and 63 of the *Act*?

**FACTS**

The complainant, Lesa Mollinga, worked as a travel consultant. Her employment commenced on May 11, 1991 with a business operating under the name of Abacus Travel Inc. (the “Vendor”). The business operated out of premises located at 2161 McNeil Road, Port McNeil, B.C.

On November 25, 1996 the Vendor sold its operation as an ongoing business to 530329 B.C. Ltd. which became Abacus Travel (1996) Inc., (the “Purchaser”). This was an asset purchase agreement. The effective date of the purchase was December 1, 1996. One of the terms of the purchase agreement required the Vendor to terminate all employees and indemnify the Purchaser from all claims and debts existing to that time.

The Determination indicates that Karin Bye is the President of the Purchaser. She confirmed that the Purchaser acquired the business known as Abacus Travel as of December 1, 1996. She confirmed to the Director's Delegate that the acquisition included the operating name of Abacus Travel, client lists, office location, equipment and assets, all of which existed in connection with the ongoing business.

**BC EST # D320/99**

The complainant's employment was continued and her first day of employment with the Purchaser was December 2, 1996. The Purchaser confirmed that the complainant's duties and remuneration remained the same as before the purchase.

The complainant's last day worked was June 12, 1998. At the time she was laid off due to a shortage of work. The Purchaser did not recall the complainant within the following 13 week period. The complainant took the position that her lay off was no longer temporary and filed a complaint with the Branch seeking vacation pay pursuant to Section 58 and compensation for length of service pursuant to Section 63 of the *Act*.

The Purchaser argues that it is not liable for the payments pursuant to Sections 58 and 63. The Purchaser does not accept that the complainant's employment with it was continuous from May 11, 1991 to June 12, 1998. The Purchaser argues that an indemnification clause in its purchase agreement with the Vendor means that the Purchaser is liable only for those obligations accruing after December 1, 1996. The Purchaser argues that the liability for compensation for length of service for the period that the complainant was employed by the Vendor is an obligation that accrues to the Vendor not the Purchaser. The Purchaser relies on the indemnification clause in its purchase agreement. I states that the obligation by the Vendor to terminate the complainant as of November 30, 1996 and pay appropriate compensation to her relieves the Purchaser from the liability for entitlements under the *Act* prior to that time.

The Purchaser also contends that a paid trip taken by the complainant to Hong Kong which had a value of approximately \$1,000.00 should be calculated to reduce any obligation to the complainant.

In its appeal submission the Purchaser asks the Tribunal to consider the current economic conditions prevailing in Port McNeil. The Purchaser states that the lay off of the complainant was "not due to the fact that I did not want her under my employ anymore . . ." but rather that the employer was battling the effects of a shrinking forest industry and a 20% reduction in commissions received by the travel agency community from the airlines.

It appears from the submission that the Purchaser was under the impression that the complainant did receive a payment from the Vendor for holiday pay and severance pay. The Purchaser further

states that she paid for the trip to Hong Kong as well as the wages of the complainant for the week that the complainant was away.

The complainant responds that she recognizes that the economy of the North Island is poor due to the slow down in the forest industry and also that her lay off was a result of these economic conditions. She further states that she did not receive a severance package from the Vendor at the time that the business was transferred but acknowledges that she did receive \$440.00 in outstanding holiday pay. She states that “[If] I had received a severance package from my former employer I would not, in good conscience, demand to receive the same amount again, even though according to the *Labour Act* (sic) I am entitled to it.”

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The complainant states that the trip to Hong Kong was not a pleasure trip but rather was a trip that, in the travel industry, is offered by tour operators to familiarize travel consultants with destinations. She stated that free time on these trips is very limited and a typical day starts at 6:30 a.m. and usually ends at 6:30 p.m. The complainant argues that the trips are not paid holidays but rather are sales tools which educate the consultants in order for them to offer better service to clients and a better return to employers. She disagrees that these familiarization trips are really a reduced rate holiday.

The complainant notes that the Determination compensated her for holiday pay for one week in 1997 and two weeks in 1998. The complainant acknowledges that when she submitted her complaint she did not request compensation for the week in 1997. She further states that:

“However, as I did not ask for compensation for that week in 1997 I am willing to drop it from the settlement amount.”

**ANALYSIS**

I turn first to the issue of the application of Section 97 of the *Act*. A leading case is *First Equipment Centre Inc.* BCEST # D282/98 reconsideration of # D597/97. Section 97 of the *Act* reads:

“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 *First Equipment Centre Inc.* (supra) the complainant had 10 years of service with the Vendor/Employer. Upon sale of the business the Vendor made a payment in lieu of notice equivalent to 8 weeks’ salary to the complainant at the point of sale. The complainant applied for

and was made an offer of employment by the Purchaser, First Equipment Centre Inc. The sale of the business occurred on December 19, 1996. On April 20, 1997 the complainant's employment was terminated and he filed a complaint under the *Act*. The Director's Delegate, in a Determination dated September 22, 1997 found that the complainant was wrongfully dismissed and was owed 8 weeks' compensation for length of service. It was found that under Section 97 of the *Act* the Purchaser, First Equipment Centre Inc., had assumed the obligations of the Vendor to the complainant.

First Equipment Centre Inc. appealed the Determination with respect to the Section 97 obligations arguing that the payment by the Vendor to the complainant discharged any obligations by the Purchaser to him. It was argued that Section 97 was not intended to interfere with the contractual arrangements between the Vendor and Purchaser in determining who was responsible for payment of financial obligations. It was further argued that the legislation did not specifically state who should be responsible for paying liability for length of service and it was argued by the Purchaser that it should not be required to make an additional payment.

That case referred to a decision in the British Columbia Court of Appeal known as *Helping Hands Agency v. British Columbia* (1996) 131 D.L.R. (4<sup>th</sup>) 336. In that case the Court decided that where an employer sells a business to a purchaser and that purchaser employs an employee of the vendor the employment of the employee is not terminated by the sale and the period of employment of the employee with the employer is deemed to have been the employment with the purchaser. In other words whenever an employer's business is sold or otherwise disposed of and the employees of the vendor are employed by the purchaser the obligations of the purchaser to those employees become the obligations for the total length of service. The liability is not limited to the period when the vendor took over the operation of the business from the purchaser.

The same rationale applies in this case. The business known as Abacus Travel Inc., including a substantial part of its entire assets, was disposed of effective December 1, 1996. The employment of the complainant was continued and is, by operation of the *Act*, deemed to be continuous and uninterrupted by the disposition. The complainant therefore is entitled to compensation for length of service based on a commencement date of May 11, 1991.

The Purchaser argues that its indemnification agreement with the Vendor should relieve it from that obligation. I cannot accept that argument. The B.C. Court of Appeal decision in *Helping Hands* (supra) states that the *Act* should be generously interpreted to permit employees to recover wages that might not otherwise be payable at common law. The point is, at common law, any claim against the former employer would expire with the sale. However, Section 97 of the *Act* is designed to specifically preserve rights of the employee when there is a disposition of a business or a substantial part of its entire assets. That is what occurred in this case.

Furthermore, the complainant states that she did not receive severance pay from the Vendor. The indemnification agreement between the Vendor and the Purchaser cannot prejudice the rights of the complainant. That is the principle established in *First Equipment* (supra) and one that will be followed in this decision. I note that notwithstanding the payment of 8 weeks' pay to the complainant in *First Equipment* the Tribunal found that the obligation for compensation for length of service followed the Purchaser. The Tribunal in that case also noted that the release that was signed by the complainant violated Section 4 of the *Act* which prohibits agreements to waive any

of the requirements of the *Act* or the regulations except in certain circumstances which did not apply in that case.

The Purchaser further argues that it should be given credit for the value of the trip to Hong Kong. I disagree. I find that the trip to Hong Kong was for business rather than pleasure purposes. Section 21 of the *Act* acknowledges that an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose unless it is otherwise permitted or required by this *Act* or another law of the Province of British Columbia or Canada. Section 21(2) further states that employers are not allowed to require employees to pay any of the employer's business costs except as permitted in the Regulations. With respect to the trip to Hong Kong I do not find that it falls within one of the exceptions to Section 21. There can be no deduction on this account.

The complainant states in her submission that she did not request compensation for outstanding holiday pay for the week in 1997 that was included in the Determination. I accept that the complainant has waived her right to those monies and direct that the Determination be varied to deduct this amount.

**ORDER**

I confirm the Determination dated February 2, 1999 except for the variance noted above. I remit the matter back to the Delegate for calculation.

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**E. Casey McCabe**  
**Adjudicator**  
**Employment Standards Tribunal**