

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-

Minh Cao and Van Nguyen operating as Chiang Mai Thai Restaurant
(the "Appellant")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE NO.: 99/350

DATE OF HEARING: August 9, 1999

DATE OF DECISION: August 13, 1999

DECISION

APPEARANCES

Minh Cao	for the employer
Van Nguyen	for the employer
Jean Johnstone-Evers	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*”) by Minh Cao and Van Nguyen operating as Chiang Mai Thai Restaurant of a Determination date May 13, 1999 which found the appellants liable for termination pay under Section 63 of the *Act*.

ISSUE(S) TO BE DECIDED

Is the appellant employer liable for termination pay under Section 63 for that period of time an employee worked for a predecessor employer where the business was sold to the appellant?

FACTS

The employers operate a restaurant known as the Chiang Mai Thai Restaurant which is situated in Surrey, British Columbia. The complainant commenced employment at the restaurant in May 1991. Her last day of work was October 2, 1998.

Minh Cao and Van Nguyen purchased the restaurant as a going concern in the Autumn of 1998. The Vendor and the Purchaser entered an Agreement of Sale dated November 23, 1998. However, the evidence at the hearing disclosed that in fact the Purchasers had assumed complete operation of the business on October 28, 1998 and had been operating the restaurant on a trial basis since October 2, 1998. It is also notable that the Agreement for Sale was not tendered as evidence until after the appeal had been launched. In other words, the Director’s Delegate did not have the Agreement for Sale when he conducted his investigation and wrote the Determination dated May 13, 1999.

The evidence disclosed that the complainant under the previous owner had worked two afternoons per week for a period of approximately 14 months prior to her last day of work.

On September 29, 1998 the Vendor informed the complainant that the restaurant was being sold and that she would be working for the new owners. This occurred in a conversation in the kitchen of the restaurant in which the Vendor and his wife, Mr. Cao, who is one of the new owners and the complainant were present. The Vendor indicated to the complainant that Mr. Cao was her new boss and that she would now be working for him. The complainant testified that she then asked for separation papers and her holiday pay. She testified that the Vendor said that he would see to it that this was done. She then turned to Mr. Cao and stated that she now worked for him to which Mr. Cao nodded and said yes.

The complainant's next shift was October 2, 1998. On that day the complainant worked with Mr. Cao and Mr. Cao's sister. The complainant completed her shift and then left for home. The Vendor was on the premises giving instructions to Mr. Cao in the kitchen. Nothing was said to her at this point that this was her last day of employment.

The following Sunday the complainant received a call at home informing her that the restaurant was closing for renovations and that she didn't need to report for her next regular shift which was Tuesday afternoon. She was informed that the restaurant would call her. She never did receive a call to work.

The complainant lives in the neighborhood and was walking by the restaurant on the Tuesday. She noticed that the restaurant was opened. The complainant looked in and saw that Mr. Cao's sister was working in the dining room. The complainant sat at a table and asked Mr. Cao what was going on. Mr. Cao indicated that it would be "soon" that she would be recalled to work. The complainant stated that she needed to know about her employment. Mr. Cao was not able to give a definitive answer nor was Mr. Nguyen who was working in the kitchen at that time. The complainant had inquired whether she should report for her shift on Friday to which Mr. Cao answered that the old owner would deal with that. The complainant indicated that she was not satisfied with that answer and reminded Mr. Cao of the previous conversation where he agreed that she was now working for him.

The complainant was not called to work after October 2, 1998. On October 8, 1998 she received a Record of Employment from the Vendor along with her pay up to September 29, 1998 and 4% of earnings up to that point. She did not receive any pay as compensation for length of service pursuant to Section 63 of the *Act*.

ANALYSIS

The employer argues that it should not be responsible for payment under Section 63 because the complainant was an employee of the Vendor. The employer argues that it did not continue the employment of the complainant after October 29, 1999 which the employer states was the effective date of its take over of the restaurant as a going concern. The employer acknowledges that it had made a down payment in September on the business but that the down payment was conditional and that the business did not actually transfer until October 29, 1999 when the conditions were fulfilled. The employer argues that even though the complainant worked on October 2, 1998 the complainant remained an employee of the Vendor and not the Purchaser. The employer argues that the Vendor was the person who ultimately paid the complainant's wages for that day.

The applicable sections of the Act are Sections 63 and 97. Section 97 reads:

Sale of a Business or Assets – 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 continues and uninterrupted by the disposition.

It is clear from the evidence that the Purchasers took over the Chiang Mai Thai Restaurant as a going concern. Furthermore, it is clear that the Purchasers were operating the restaurant during the month of October 1998 all be it the Vendor was required to fulfill certain conditions. The complainant did work on October 2, 1998 notwithstanding the fact that ultimately it was the Vendor who paid her wages for that day. The complainant did not receive compensation for length of service pursuant to Section 63 of the *Act*.

I find under these circumstances that the complainant's employment was continuous and uninterrupted by the disposition. The Purchasers subsequently did not wish to retain the complainant's services. The Purchaser's did not give written notice pursuant to Sections 63(3) of the *Act* they simply didn't contact the complainant. Rather, the complainant took the position that after 13 weeks of lay off her lay off became a deemed termination and she filed her complaint.

I acknowledge the Purchaser's argument that the liability for past service under Section 63 should be the liability of the Vendor not the Purchaser. However, any issue between the Vendor and the Purchaser respecting liabilities of the purchased business should remain an issue between those two parties and should not prejudice the right of the complainant to her entitlement for compensation for length of service pursuant to Section 63 of the *Act*. For these reasons I dismiss the employer's application.

ORDER

The Determination dated May 13, 1999 is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal