

An appeal

- by -

Sladey Timber Ltd.
("Sladey")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David B. Stevenson

FILE No.: 2002/243

DATE OF DECISION: August 12, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Sladey Timber Ltd. (“Sladey”) of a Determination that was issued on April 11, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Sladey had contravened Part 8, Section 63 of the *Act* in respect of the employment of Fred Hansen (“Hansen”) and ordered Sladey to cease contravening and to comply with the *Act* and to pay an amount of \$14,726.25.

In this appeal, Sladey has raised several questions in respect of the Determination:

1. In the circumstances, did Hansen have ‘continuous employment’ with Sladey?
2. Did Sladey acquire the major portion of T&T’s assets?
3. Why was Sladey not provided with all of the documents they requested?

Sladey also questions the calculations done by the Director, claiming the Director erred by including overtime pay and statutory holiday pay in calculating the length of service compensation owed to Hansen.

In the exercise of its authority under section 107 of the *Act*, the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUE

The issue in this appeal is whether Sladey has shown an error in the Determination sufficient to persuade the Tribunal to exercise its authority under Section 115 of the *Act* to vary it or to send it back to the Director for further investigation.

FACTS

Sladey is a logging business. Hansen was employed by Sladey from June 2000 to December 15, 2000 as a logger/grapple yard operator at a rate of \$26.00 an hour. Hansen had worked for T&T Trucking Ltd. (“T&T”) from 1982 until June, 2000, when some of the assets of T&T were disposed of to Sladey, and Hansen was employed by Sladey to work as a grapple yard operator. Addressing the disposition, the Determination stated:

The evidence was that Sladey Timber Ltd. purchased a grapple yarder, 2 logging trucks and a low bed from T&T. The evidence was further that Sladey Timber Ltd. obtained a contract or timber quota previously held by T&T. The evidence was further that according to Trousdell, the owner of T&T, at that point in time the assets sold to Sladey Timber Ltd. comprised a major part of his logging business.

Hansen was terminated by Sladey effective December 15, 2000 without written notice or just cause.

The Determination found there had been a disposition of a ‘substantial’ part of the entire assets of T&T to Sladey. The Determination used dictionary definitions of the concept of ‘substantial’ as being something:

“ . . . of real worth and importance; of considerable value; valuable; belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable; something worthwhile as distinguished from without value or merely nominal . . . ”

“ . . . consisting of or relating to substance; not imaginary or illusory, real, true, ample to satisfy and nourish; possessed of means; considerable in quantity; being largely but not wholly that which is specified; significantly great . . . ”

The Director calculated the wages owing for length of service compensation according to the direction found in subsection 63(4) of the *Act*, and added annual vacation pay to that amount and interest on the total amount of wages owed.

ARGUMENT AND ANALYSIS

Section 97 of the *Act* says:

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.

In *Dharampal Singh Gill*, BC EST #D544/00 (Reconsideration denied, BC EST #RD040/02), the Tribunal made the following comments concerning the interpretation and application of Section 97 of the *Act*:

In interpreting section 97, one must remain cognizant of the fact that employment standards legislation in general, and this provision in particular, must be given such fair, large and liberal construction as best insures the attainment of its objects--see *Machtinger v. HOJ Industries Ltd.* [1992] 1 S.C.R. 986; *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27; *Helping Hands Agency Ltd. v. B.C. Director of Employment Standards* (1995), 15 B.C.L.R. (3d) 217 (B.C.C.A.).

The purpose of section 97 of the *Act* is to preserve the employment status of employees when their employer's business (or their employer's business assets) is sold or otherwise transferred (“disposed of”) to a third party. This provision is sometimes referred to as a “successorship” provision in that it creates certain ongoing employment rights and entitlements for employees who continue to work for the subsequent or “successor” employer following the sale of the business or a substantial part of the business assets.

Section 97 is triggered when the individual in question is an “employee of the business” on the date of the disposition. The disposition itself does not terminate the employment relationship; the employment relationship merely continues with the successor employer being, in effect, substituted for the previous employer as the employer of record. This is not to say that the new employer must continue to employ all of the employees of the former employer. However, unless appropriate arrangements are made so that the employment of such persons is terminated on or before the disposition is completed, those employees continue on as employees of the new employer and retain all of their accrued rights and entitlements (including service-based benefits), but only insofar as the *Act* is concerned, vis-à-vis the 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.).

I am satisfied, from the material on file, that there was a disposition from T&T to Sladey within the meaning of Section 97 of the *Act*. I agree with the analysis done by the Director. In the circumstances, and based on the assets which were ‘disposed of’ by T&T to Sladey, I agree that disposition represented a ‘substantial’ part of the assets of the logging business of T&T. Whether the assets purchased by Sladey represented a majority of the “hard” assets belonging to T&T is not helpful in deciding whether the assets disposed of represented a ‘substantial part’ of the assets of a business. The assets which were acquired by Sladey allowed Sladey to step into an ongoing business operation. That much is apparent from the fact that T&T stepped out of the logging operation on a Friday and Sladey stepped into it on the following Monday. I do not agree that the logging contract was not an ‘asset’ of the business of T&T. I accept the submission of the Director that without the transfer of the timber quota, Sladey could not have taken over the Misery Creek logging operation.

Sladey says the grapple yarder was not purchased by Sladey, but by another company for resale. There are two substantive responses to that assertion. First, there is a burden on Sladey in this appeal to demonstrate, with cogent evidence, any alleged error in the Determination. No support for this assertion has been provided. It is quite inconsistent with the information provided by Mr. Trousdell. Second, the conclusion that the grapple yarder was ‘disposed of’ in the context of Section 97, even if it went into the name of another company, is not inconsistent with the approach taken by the Tribunal relating to the scope of the language used in Section 97. In the Tribunal's reconsideration decision *Lari Mitchell and others*, BC EST #D107/98 (Reconsideration of BC EST #D314/97), the following point was made:

We note that the language of section 97 is broad in scope. Although it is natural to speak of section 97 in relation to the “sale” of a business, it is the word “disposed” that is used in the legislation. Section 29 of the Interpretation Act, R.S.B.C. 1996, c. 238 defines “dispose” as follows:

“dispose” means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things;

The point we wish to make is that the language of section 97 is broad enough to include any disposition that results in a change in the legal identity of the employer. Throughout this decision, for the most part, we use the word “disposition”. For ease of reference we will refer to the “vendor” (the employer who disposes of the business) and the “purchaser” (the employer who acquires the business).

The fact is that the grapple yarder was acquired for Sladey’s business, was used in that business and continued to be operated by Hansen, who was employed by Sladey. There is nothing in Section 97 that requires the disposition to be specifically to the employer. The grapple yarder was one of the assets that was ‘disposed of’ by T&T, was part of that business and was used in the successor business. The elements of Section 97 are the disposition of a business, or the assets of a business, and the continuation of employment of an employee from the predecessor to the successor business. The elements of Section 97 are satisfied in this case, regardless of whether the grapple yarder was placed in the name of some other entity at the time of the disposition.

There is also a procedural response. The Determination provides no indication that Sladey provided the information concerning the grapple yarder during the investigation. If Sladey felt this information had some significance to its position, it should have given that information to the investigating officer. Had such information been provided, the investigating officer could have checked its veracity and its relevance, considered what impact, if any, such information might have on the conclusions in the

Determination and considered whether a finding under Section 95 was required or warranted as a result of such information. Normally, the Tribunal will not allow information to be introduced in an appeal that could have and should have been provided during the investigation.

I will make a final comment on this aspect of the appeal. In my view, the Director could also have justified the application of Section 97 of the *Act* on the basis that T&T had disposed of a 'part of a business' to Sladey. In the circumstances, the Director did not need to rely exclusively on the disposition of assets in concluding Section 97 applied.

There is no doubt the Director was correct in determining that Hansen's employment was, for the purposes of the *Act*, 'continuous and uninterrupted'. Hansen was an employee of T&T on the date of the disposition and subsequently became an employee of Sladey. That has been referred in many decisions of the Tribunal to as the clearest case for the application of Section 97. The fact T&T issued a Record of Employment is not relevant to the application of the *Act*. T&T is required by federal legislation to issue that document and its issuance does not affect the operation of Section 97 of the *Act*. What occurred following the disposition and the continuation of Hansen's employment with Sladey is irrelevant to the obligation created by the application of Section 97. Even if Hansen returned to T&T following his termination from Sladey, that does not discharge Sladey from their statutory obligation to pay length of service compensation to Hansen upon their terminating of his employment. Sladey's inquiry about whether the Director should have required Hansen and T&T to provide documents cannot be considered in a vacuum. There is no reference in the appeal to what documents should have been provided by those parties, what relevance the documents had to the issues raised in the investigation and why it was necessary that Sladey be provided those documents.

Finally, I am also satisfied that the calculation of compensation for length of service by the Director in the Determination was correct in all respects.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 11, 2002 be confirmed in the amount of \$14,726.25, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal