

An appeal

- by -

Western Everfresh Bakeries Ltd.
("Western Everfresh")

- 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.: 2002/269

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 Western Everfresh Bakeries Ltd. (“Western Everfresh”) of a Determination that was issued on April 25, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Western Everfresh had contravened Part 7, Section 58(3) of the *Act* in respect of the employment of Mike Faulkner (“Faulkner”) and ordered Western Everfresh to cease contravening and to comply with the *Act* and to pay an amount of \$133.67.

Western Everfresh says the Determination was wrong to have found that Faulkner’s employment was continuous and uninterrupted from a predecessor employer, William Thomas operating as White Dove Bakery, to Western Everfresh. The appeal also contains an allegation of unfairness and bias against the investigating officer.

ISSUE

The issues in this appeal are whether the Director was correct in finding that Faulkner’s employment was, under Section 97 of the *Act*, continuous and uninterrupted from a predecessor employer, William Thomas operating as White Dove Bakery, to Western Everfresh and whether Western Everfresh has shown the investigating officer was unfair or biased against them during the investigation..

FACTS

The Determination set out the following background information, none of which is challenged in this appeal:

Western Everfresh Bakeries Ltd. is in the bakery business, which is under the jurisdiction of the *Act*.

Faulkner worked for William Thomas operating as White Dove Bakery from August 01, 2000 to January 31, 2001. On February 01, 2001, he began to work for Western Everfresh Bakeries Ltd. Until November 12, 2001. He worked for both companies as a “packer” at a rate of \$8.00 per hour.

Faulkner initially claimed forty (40) dollars that was taken off his last pay cheque in error as an advance, four (4) hours wages for the day he was originally scheduled to work but was changes without at least twenty-four (24) hours advance notice, and one weeks severance pay remains outstanding. All but vacation pay has been withdrawn.

The complaint was filed within the time period allowed under the *Act*.

The vacation pay claimed related to the period he was worked for William Thomas operating as White Dove Bakery. The Determination made the following findings of fact:

William Thomas, owned White Dove Bakery is [sic] a sole proprietorship business. William Thomas is also a Director/Officer of Western Everfresh Bakeries Ltd. Based on a submission of Barnes the two companies became co-owners of Western Everfresh [Bakeries] Ltd. effective February 1, 2001.

Faulkner worked for William Thomas operating as White Dove Bakery from August 1, 2000 to January 31, 2001. Western Everfresh [Bakeries] Ltd. started in February 1, 2001 when RT Foods and William Thomas operating as White Dove Bakery became co-owners of a company by combining the two businesses. Faulkner continued to work performing the same duties at the same location throughout the merger of William Thomas operating as White Dove Bakery and R.T. Foods Ltd. which became Western Everfresh [Bakeries] Ltd.

The Director concluded that by operation of Section 97 of the *Act*, Faulkner's employment should be considered to have been continuous and uninterrupted from William Thomas operating as White Dove Bakery to Western Everfresh.

ARGUMENT AND ANALYSIS

For reference, Section 97 of the *Act* reads:

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 *Lari Mitchell and others*, BC EST #D107/98 (Reconsideration of BC EST #D314/97), the Tribunal stated in respect of the term 'disposed':

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.

There can be no argument that the business of William Thomas operating as White Dove Bakery was disposed of to Western Everfresh Bakeries Ltd. It is not relevant to a conclusion under Section 97 that the business being disposed of was operating at a loss, had incurred significant debt or was effectively of no value. In this appeal, Western Everfresh says that the business of William Thomas operating as White Dove Bakery was 'wound up' on January 31, 2001. The Director, however, points out in reply that position is inconsistent with previous submissions made by Western Everfresh during the investigation, specifically noting two comments, the first from a document entitled "Bake Haus History" which was provided by Mr. Dennis Barnes, on behalf of Western Everfresh, and which stated:

RT Foods and White Dove had already started the process of amalgamating their businesses and had formed Western Everfresh Bakeries Ltd. for this purpose.

The second comment comes from a letter dated April 8, 2002, in which Mr. Barnes stated:

Western Everfresh was started on February 1, 2001 when RT Foods and White Dove bakery decided to become CO-owners of a company which combined both their businesses.

The suggestion made by Western Everfresh is also inconsistent with the facts on file. Faulkner was an employee of White Dove Bakery until January 31, 2001. On February 1, 2001, he became an employee of Western Everfresh, continuing at the same job, in the same location, for the same wage, for an entity which was represented to be a merger of the two businesses working at that location up to January 31, 2001. There was no evidence that Faulkner was terminated from his employment with White Dove Bakery prior to the disposition. I do not view his acceptance of a job offer with Western Everfresh as being anything other than an agreement to continue his employment with the new entity on the same terms as he had with White Dove Bakery. There is no doubt his employment with White Dove Bakery ended, but that was only because of the disposition. That is the very circumstance for which Section 97 was designed. As the Tribunal noted in *Lari Mitchell and others, supra*:

. . . section 97 explicitly states that upon a disposition of a business “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 other words, the disposition of a business does not terminate employment because employment is deemed to continue for the purposes of the Act.

In the face of the established facts, the Tribunal would need some strong and cogent evidence that Section 97 of the *Act* had no application. None has been provided.

The appeal on this issue is dismissed.

On the allegation of bias against the investigating officer, there is no substantive objective evidence to support this allegation. The assertion that the investigating officer excluded documents that contradicted the conclusion made in the Determination and failed to provide a balanced analysis is not demonstrated in the appeal or in the supporting materials and this aspect of the appeal is also dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 25, 2002 be confirmed in the amount of \$133.67, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal