

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.: 2002/270

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 Donald Bee (“Bee”) and Lani Seafoot (“Seafoot”) and ordered Western Everfresh to cease contravening and to comply with the *Act* and to pay an amount of \$1369.41.

Western Everfresh says the Determination is wrong to have found that Bee’s and Seafoot’s employment was continuous and uninterrupted from a predecessor employer, Bakehaus Bakery Ltd. (“Bakehaus”), 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 Bee’s and Seafoot’s employment was, under Section 97 of the *Act*, continuous and uninterrupted from a predecessor employer, Bakehaus, to Western Everfresh and whether Western Everfresh has shown the investigating officer was unfair or biased against them.

FACTS

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

- Western Everfresh Bakeries Ltd. and Bakehaus Bakery Ltd are in the bakery business, which is under the jurisdiction of the Act.
- Bakehaus Bakery Ltd. ceased operating effective January 31, 2001. Western Everfresh Bakery commenced operating in the same location as the Bakehaus Bakery Ltd. effective February 1, 2001.
- Bee worked for Bakehaus Bakery Ltd. from 1997 to January 31, 2001. On February 01, 2001, he began to work for Western Everfresh Bakeries Ltd. until April 30, 2001. He worked for both companies as a “delivery driver” at a rate of five percent (5%) commission.

- Seafoot worked for Bakehaus Bakery Ltd. from July 1999 to January 31, 2001 as a “slicer/packer” at the rate of \$8.00 per hour. On February 01, 2001, she began to work for Western Everfresh Bakeries Ltd. and is currently employed with Western Everfresh Bakeries Ltd. in the same position at the same rate of pay.
- The complaint was filed within the time period allowed under the Act.

The vacation pay claimed related to the period both Bee and Seafoot worked for Bakehaus Bakery Ltd. The Determination made the following findings of fact:

Barnes has claimed he does not know if Seafoot was paid for the vacation pay in the amount of \$464.91, but assumes this amount remains outstanding from the Bakehaus Bakery Ltd. Barnes also stated he does not know if Bee was paid for vacation pay in the amount of \$839.74, but assumes that Bakehaus Bakery Ltd. owes him those wages as well. Accordingly, I find that wages for annual vacation pay in the above noted amounts are outstanding.

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

Dennis Barnes is a common Director/Officer of the Bakehaus Bakery Ltd. and Western Everfresh Bakeries Ltd.

Bee received two records of employment . . . dated for the same day (May 11, 2001) and signed by the same person (Louise Wilson) for his employment with both Western Everfresh Bakeries Ltd. and Bakehaus Bakery Ltd.

It should also be noted that R.T. Foods Ltd., a company also owned by Mr. Barnes, held fifty-one percent (51%) of the shares of Bakehaus Bakery Ltd.

The Director concluded that by operation of Section 97 of the *Act*, Bee’s and Seafoot’s employment should be considered to have been continuous and uninterrupted from Bakehaus Bakery Ltd. to Western Everfresh and, consequently, Western Everfresh was responsible for the unpaid vacation pay.

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 Bakehaus Bakery Ltd. was disposed of to Western Everfresh and Section 97 of the *Act* was applicable. All of the material supports the conclusion made on this issue by the Director. In this appeal, Western Everfresh says that the business of Bakehaus Bakery Ltd. was ‘insolvent’ on January 31, 2001 and was of no value. 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. There are no such qualifications on the application of Section 97.

In a letter provided during the investigation dated April 8, 2002, Mr. Barnes, acting on behalf of Western Everfresh, 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.

Bee and Seafoot were employees of Bakehaus Bakery Ltd. until January 31, 2001. On February 1, 2001, they became employees 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 Bee and Seafoot were terminated from their employment with Bakehaus Bakery Ltd. prior to the disposition. There is no doubt their employment with Bakehaus Bakery Ltd. 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.

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 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 \$1369.41, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal