

An appeal

- by -

SMS Modern Cleaning Services Inc. operating as Focus Building Services  
(the "Employer")

- 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:** Ib S. Petersen

**FILE No.:** 2001/115 and 2001/118

**DATE OF HEARING:** June 15, 2001

**DATE OF DECISION:** July 10, 2001

## DECISION

### APPEARANCES:

Mr. Bob Domenichelli	on behalf of the Employer
Mr. James Kish	on behalf of himself
Ms. Jennifer Leite	on behalf of herself

### OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against two Determinations of the Director of Employment Standards (the “Director”) issued on January 16, 2001. One Determination against the Employer concluded that the Employer terminated Kish and that he, in the result, was owed \$1,545.18 on account of wages and compensation for length of service. In another Determination, the delegate concluded that Leite was owed \$2,174.39 on account of vacation pay.

### FACTS AND ANALYSIS

The relevant facts may briefly be set out as follows.

1. SMS purchased Focus as of June 1, 1999. The form of this transaction is not described in any detail. The Employer advised the delegate that when it purchased Focus all “hourly and salary employees were either paid out or give (sic.) time off their vacation pay by the previous employer... and all employees were rehired as of [June 1, 1999].”
2. The Determination found that Kish worked for Focus since 1990. When SMS took over the operation, it continued to employ Kish.
3. Kish’ duties included cleaning SMS/Focus’ main office building twice a week. The employer claimed that Kish was terminated as of June 26, 2000 and that he was offered but refused alternative employment. At that time, the locks were changed and, says the Employer, Kish could not have done the inside cleaning.
4. Kish denied being terminated as of June 26, 2000 and that he was offered alternative employment. Kish explained to the delegate that he worked five days a week, two hours a day, and received \$300 bimonthly. Kish agrees that the locks were changed but says that he continued to do the outside work until August 22, 2000 and was told by Canny Atwal, SMS’ operations manager, that he was terminated.

5. Leite also worked for Focus before SMS took over, since October 1997. She was employed in a clerical or administrative capacity. At the time she resigned, she was earning \$1,700 per month.
6. The Determination indicates that she received \$416.00 in vacation pay. Leite says that she was not paid out when the business was sold and, as well, that she never had a vacation or was paid vacation pay during her employment with SMS/Focus. The Employer's evidence is this: Domenichelli says that Atwal told him that Leite quit and that he told Atwal to pay her what was owed.

The nub of both appeals is that the Employer ought not to be liable for the service with the previous employer, Focus. I deal with that argument first.

Section 97 reads:

97. If all or part of a business or 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.

A leading case with respect to Section 97 is *Lari Mitchell, above*. In that case the original panel of the Tribunal noted, at pages 6 and 7:

“... However, unless appropriate arrangements are made so that the employment of such persons is terminated on or before the asset sale is completed, those employees continue on as employees of the asset purchaser and retain all of their existing rights and obligations ...

Section 97 is triggered when there is a sale of business assets and no concomitant termination of employment prior to the completion of the sale. In such circumstances, the employees' existing rights under the *Act* are merely transferred from the asset vendor (their former employer) to the asset purchaser (their new employer). If, prior to the sale, the asset vendor terminates the employees' (say, as a condition of the sale agreement), the employees may then only assert their rights under the *Act* as against the asset vendor.”

The reconsideration panel agreed with this analysis.

In the judicial review decision in the *Mitchell* case (*Mitchell et al. v. Director of Employment Standards et al.*, unreported, Victoria Registry, No. 981971 (B.C.S.C.), the Court upheld the reconsideration panel's decision and noted with reference to Section 97, at page 21:

“I conclude that s.97 must be interpreted to mean that if employees are employed by a vendor at the time a business is disposed of then, for the purposes of the *Act*, the employment of those employees is deemed to be continuous with the successor employer. In short, nothing has changed and all the benefits of these employees are continued with the new employer. Their employment is continuous and it cannot be said to have been terminated.”

In this case, Dominichelli explains that it was his understanding that all employees of Focus were terminated prior to the sale. I have some sympathy for the Employer's case. Unfortunately, the Employer's evidence did not provide any details or particulars of the purchase of the business of Focus and the termination of the employees, Leite and Kish. In the case of Kish, it was Dominichelli's understanding that Kish was not even employed by Focus but by Kujat. Kish denied that he was terminated prior to the sale. Leite says that she was not, as asserted by the Employer, paid out for her vacation time. She simply continued her employment and had her benefits--dental, vacation etc.--carried over. Importantly, there was no documentation supporting the termination of Leite and Kish prior to the sale of the business. In the circumstances, I do not accept the Employer's argument that Leite's and Kish' dispute is with the former employer.

I now turn to the delegate's findings with respect to Leite and Kish.

First, with respect to Leite, I am of the view that the delegate did not err. Dominichelli simply asserts that she quit and that he instructed Atwal to pay her what she was owed. In short, he does not have personal knowledge of the facts of Leite's circumstances. He is not in a position to dispute that she did or did not take vacation or that she was or was not paid with respect to her vacation entitlement.

Second, turning briefly to Kish's circumstances, it is clear to me that Dominichelli does not have much direct knowledge of the circumstances of Kish's employment or the termination of his employment. He was not present when Kish performed the duties of his employment, early in the morning. Dominichelli states that, in his view, Kish was employed prior to the purchase, not by Focus, but by Bill Kujat, the principal of Focus. Kish states that his T-4's were issued by Focus. Other documentation on file indicates that Kish was, indeed, employed by Focus. Kish's evidence was that he continued to work until his termination by Atwal, *i.e.*, for the first two weeks of August and that he was not paid for this work. This testimony was not contradicted. As well, Kish denied being offered alternative work. In fact, He says that if the work suggested by the Employer had been offered to him, he would have accepted it as this was more convenient for him. I find that the delegate did not err with respect to Kish.

In the result, the appeal fails.

**ORDER**

Pursuant to Section 115 of the Act, I order that the two Determinations in this matter, dated January 16, 2001 be confirmed.

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**Ib S. Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**