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 -

Wille Dodge Chrysler Ltd
("Wille Dodge")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	John M. Orr
FILE NO.:	97/81
DATE OF HEARING:	July 18, 1997
DATE OF DECISION:	September 5, 1997

DECISION

APPEARANCES:

John Waldie	Counsel for Wille Dodge Chrysler Ltd
Kathy Doyle	For Wille Dodge Chrysler Ltd
Adele Adamic	Counsel for the Director
David Oliver	Industrial Relations Officer

OVERVIEW

This is an appeal by Wille Dodge Chrysler Ltd ("Wille Dodge") pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination (File No. 022147) dated January 28, 1997 by the Director of Employment Standards (the "Director").

The Determination found that when Wille Dodge sold its car rental business to Aviscar Inc. ("Avis") the conditions of employment of one of the managers, Dennis Scherk ("Scherk"), were substantially altered and that therefore his employment with Wille Dodge was terminated and he was entitled to compensation for length of service.

Wille Dodge has appealed on the basis that the Director's delegate failed to take into account Section 65(1)(f) of the *Act* and that Scherk was offered and refused reasonable alternative employment by Avis, the successor employer. Although not initially raised as a ground of appeal the effect of Section 97 of the *Act*, which deems employment to be continuous on sale of a business, was properly included in argument at the hearing of the appeal.

ISSUES TO BE DECIDED

The issues to be decided in this case are firstly whether the Employer can rely on the offer of reasonable alternative employment as referred to in Section 65(1)(f) of the *Act* if the offer is given by a third party, in this case by a successor purchaser of the business, and, secondly, was the offer in this case reasonable. The third issue is whether the effect of Section 97 of the *Act* is that the vendor/employer has no obligation to the employees once the business is sold.

FACTS

Scherk worked for Wille Dodge from July 1988 to June 1996 as a manger of their downtown car rental subsidiary. In June of 1996 Wille Dodge sold the car rental subsidiary to Avis. Avis made arrangements to interview all the employees and assured them of continuing employment with Avis. No arrangement was made between Avis and Wille dodge for any employees to be given

notice of termination prior to the completion of the sale. It was the stated intention of Avis to retain all of the employees in their respective positions.

In Scherk's case he was offered essentially the same position except that the title of his position would be changed to fall in line with the international corporate structure of the Avis corporation. He no longer would be called a "Manager" but would be called a “Lead Agent". He would still be the senior supervisor at the location. His salary would remain at the same level and he would have, in addition, an incentive scheme which could improve his earnings. His benefit package had substantial improvements and he would still have the use of a car subject to availability. Seniority was to be protected and the employees were given 83% of the annual holiday pay entitlement, even though the sale was completing at the 50% stage of the year. All holiday entitlements were honoured.

At the meeting between Scherk and Avis on June 17, 1996, Scherk made it clear that he did not want to work for the new owners. He called them "corporate nazis" but despite this was given an opportunity to reconsider. Scherk decided that he would not continue his employment with the new company and on the following day advised Wille Dodge of his decision. Wille Dodge issued a Record of Employment (ROE) on June 18, 1996 which indicated that Scherk had quit his employment.

Subject to any deeming provisions of the *Act*, Scherk never became an employee of the purchaser, Avis. He did not sign any employment contract and did not at any time work for the new company. The ROE was issued by Wille Dodge.

ANALYSIS

The relevant provisions of the *Act* are as follows:

> *63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.*
>
> *(2) The employer's liability for compensation for length of services increases as follows:*
>
> (in this case to 7 weeks)
>
> *(3) The liability is deemed to be discharged if the employee*
>
> *(c) terminates the employment ...*
>
> *65. (1) Sections 63 and 64 do not apply to an employee*
>
> *(f) who has been offered and has refused reasonable alternative employment by the employer.*

> *66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.*
>
> *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 this case the Director's Delegate found that, whether or not the offer of continued employment was reasonable alternative employment (S.65), there was a substantial alteration in the conditions of employment (S.66) and therefore the employment was terminated and the employee was entitled to compensation. The Director's Delegate found that the loss of status (i.e. the change of title from manager to lead agent), some slight possible reduction in free car use and "perhaps more importantly" the change in ownership amounted to a substantial change in the conditions of employment.

The Director's Delegate referred to a policy of the Employment Standards Branch which provides that where there is a sale of the business and the employee chooses not to accept employment with the purchaser the employee is entitled to compensation.

The facts before me at the hearing of this appeal were not substantially different than as given to the Director's Delegate. I find that the offer of alternative employment was reasonable. Other than the change in title, which was consistent with the structure of the new company, all of the terms of employment were substantially the same. Where there may have been very slight reductions in accessibility to free car use this was amply balanced by a superior benefit package, additional holiday allowances, and bonus incentives see *Stordoor Investments Ltd* [1996] BC EST #D357/96. Therefore, for the purpose of S. 65 of the *Act*, I find that the employee was offered and refused reasonable alternative employment.

The next issue is whether the offer of reasonable alternative employment must be "*by the employer"* (S.65(1)(f)). In situations where there is no sale of the shares or assets of the employer company involved I would agree with the Director's counsel that the offer of reasonable alternative employment can not emanate from a third party. At common law, in a wrongful dismissal action, such a third party offer might be an important consideration relating to mitigation of damages but under the statutory scheme in place in British Columbia it would not relieve an employer of the duty to compensate under the *Act.* For an employer to benefit from the provisions of S.65 the reasonable alternative employment must be offered "by the employer".

In this case the offer of reasonable alternative employment did not emanate from Wille Dodge but from Avis, the purchaser of the subsidiary. This raises the applicability of S.97 of the *Act* which is sometimes referred to as a "successorship" provision following the sale of the assets of a business. This issue has recently been discussed by a three member panel of the Tribunal in the matter of an appeal *Lari Mitchell and others and B.C. Government and Service Employees' Union and*

British Columbia Systems Corporation and Public Sector Employers' Council BC EST #D314/97 ("B.C. Systems") upon which much of the following analysis is based.

Section 97 of the *Act* is similar to what is now section 35 of the B.C. *Labour Relations Code* which was considered in what is known as the *Verrin* case *[B.C.G.E.U. v. Industrial Relations Council (1988) 33 B.C.L.R. (2nd) 1]*.

In *Verrin* the operations of a laundry service were transferred from the Ministry of Health to a newly incorporated society. Mr Verrin, who was a laundry truck driver, refused to accept a position with the new employer and claimed to be laid off and entitled to the appropriate benefits. The matter eventually came before the B.C. Court of Appeal which held that section 35 did not create an employment relationship between Verrin and the successor society. The majority of the Court stated, at pp.22-23:

> "If one examines these provisions in their most favourable light insofar as the government is concerned they cannot be interpreted so as to make Verrin an employee of the purchaser. There is no logical or rational basis for holding that Verrin ceased to be an employee of the government or that he ever became an employee of the purchaser... The statute may, in a sense, have provided for the assignment of the collective agreement from the government to the purchaser. It did not provide for the assignment of the employees from the government to the purchaser."

The Court went on to say that if there were reasons to make the employees of a former employer the employees of the purchaser it would be up to the legislature to make such provisions in the legislation.

In the *B.C. Systems* decision the Tribunal found that the language under the *Labour Relations Code* and section 97 of the *Act* were different. The Tribunal stated, at page 6:

> "However, in our view, the language of section 97 of the *Act* does create the very sort of ongoing employment relationship referred to by the Court of Appeal in *Verrin*. Section 97 explicitly states that upon the asset sale "the employment of an employee of the business is deemed, for the purposes of the *Act*, to be continuous and uninterrupted"... The asset sale itself does not terminate the employment relationship; the employment relationship merely continues with the asset purchaser being, in effect, substituted for the asset vendor as the employer of record."

The Tribunal's decision continues, page 7:

> "Of course, the employees of the asset vendor, assuming they have not otherwise quit or been terminated, are not obliged to continue to be employed by the asset purchaser. However, if they refuse to continue on with the asset purchaser, then they have, in effect, voluntarily quit and are not entitled to claim termination pay [see section 63(3)(c) of the *Act*] nor would they be eligible for group termination pay under section 64."

I agree with the above analysis by the Tribunal and applying it to this case find that when Scherk refused to continue to be employed in a substantially identical position by the asset purchaser he did, in effect, quit and is not entitled to claim termination.

The question remains, as decided by the Director's Delegate, whether the change in ownership itself is a substantial alteration in the terms of employment that would justify a determination by the Director that the employment has been terminated. I cannot agree with the Determination on this point. If any sale of assets amounted to a substantial alteration in the terms of employment thereby allowing the Director to decide that the employees have been terminated, section 97 would have little meaning. Such a situation would result in great uncertainty as every asset sale would be subject to a subsequent and subjective determination by the Director. Of course, if the terms of employment are substantially altered after the sale, the employee would be entitled to claim against the purchasing employer for constructive dismissal or the Director would be entitled under section 66 to determine that the employee had been terminated.

Such is not the case here. Scherk decided from the outset that he was not going to accept employment with the purchaser no matter how good the employment situation was going to be. He elected to terminate his own employment and is therefore not entitled to compensation.

ORDER

I order, under Section 115 of the *Act*, that the Determination is cancelled.

John Orr
Adjudicator
Employment Standards Tribunal