

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 -

Teamwork Property Solutions Ltd.
("TPS")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 97/589

DATE OF DECISION: September 25, 1998

DECISION

OVERVIEW

This is the second decision relating to an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Teamwork Property Solutions Ltd (“TPS”) of a Determination of a delegate of the Director of Employment Standards (the “Director”) dated July 22, 1997. In the Determination the delegate concluded TPS was responsible to a former employee of TPS, Theresa Crerar (“Crerar”), in an amount totaling \$1779.64, and comprising length of service compensation and unpaid vacation pay in an amount of \$1683.69 together with interest in an amount of \$95.95. TPS disputed the Determination, claiming they were not the person responsible for the amounts owed to Crerar, and further claiming that Crerar was not an employee of TPS, but was either an employee of the owners of the property, for whom TPS was merely acting as agent, or was an independent contractor.

In the earlier decision relating to the above Determination, BC EST D#441/97 (the “first decision”), I found the Determination fell short of the statutory requirements found in paragraph 81(1)(a) of the *Act*, which reads:

81. (1) *On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:*
- (a) *the reasons for the determination;*

In making that judgement, I adopted the following statement of principle:

It is fundamental to the concept of natural justice that a person determined to be liable for a contravention of the *Act* have a clear understanding about the reasons why the delegate reached that conclusion. That information is basic to knowing the case they have to meet if they choose to exercise their right to appeal that conclusion.

. . . In this case . . . I cannot find that a reasonably informed layperson, familiar with the contents of the file, could understand why the delegate concluded TPS was responsible to Crerar under the *Act* for length of service compensation and vacation pay.

In result, I exercised my authority under Section 115(1)(b) of the *Act* and remitted the matter back to the Director for further investigation and clarification of the reasons why the Director concluded that TPS had contravened the *Act* and was responsible for length of service compensation and vacation pay to the individual involved.

One of the critical deficiencies in the Determination related to the apparent application of Section 97 of the *Act* to the circumstances as they appeared on file. I pointed out a number of concerns in regard to that matter:

As stated earlier, it appears the complex had just been purchased by Shahrvand, Adams and another person, Frank Redenback, shortly before Crerar was terminated and TPS also had only recently become involved in the management of the complex. While no direct conclusion to this effect is found in the Determination, the material on file suggests the delegate concluded Section 97 of the *Act* applied in the circumstances. That conclusion was reached without the benefit of determining what business was disposed of, what relationship Crerar had to that business and who assumed the business. That conclusion also fails to consider either the question of whether Crerar had employment with that business and, if there was employment, the identity of the employer. All those matters would appear to be important in light of what seems to have been the recent involvement by TPS in managing the complex.

On March 9, 1998, the Director submitted a report to the Tribunal which represented the results of the further investigation ordered in the first decision. The opening paragraph of the report outlines its purpose:

This report is submitted to the Tribunal as directed by Ian Lawson, Adjudicator, in his September 30, 1997 decision. This report is intended to address the deficiencies in the reasons given in the July 22, 1997 Determination.

The reference to the September 30, 1997 decision being issued by Ian Lawson is incorrect as that decision was issued by me, not Mr. Lawson. I can find no record of any Tribunal decision issued by Mr. Lawson relating to TPS.

In reply to the report, TPS continues to maintain that it was not the employer of Crerar. TPS also questions how they can be held responsible for portions of her employment before TPS ever became involved in the property management of Woodland Village. Their position is stated in the following way:

How can a Determination be made upon Theresa Crerar's employment four years prior, when you stated that she worked for Wescan Concepts in Victoria prior to these property owners purchasing Woodland Village?

This clearly relates back to contract law of purchase and sale and cannot be attached to some future management company especially considering the time lapse between the sale date and management engagement.

ISSUE TO BE DECIDED

The issue continues to be as described in the first decision:

The issue is whether Crerar was an independent contractor or an employee and, if the latter, whether TPS was the employer and should be held responsible for length of service compensation and vacation pay.

FACTS

It is worthwhile to outline a substantial portion of the findings of fact from the first decision:

The available facts are scant. It appears from the documentation that for at least 4 years prior to July, 1996, Crerar lived at a condominium or town home complex in Port Alberni called Woodland Village. During that 4 year period of time she performed the services of Resident Manager in relation to the administration of the complex. Her duties included collecting and depositing rents and she received an amount of money each month for the services she performed. For at least the last 3 months prior to July, 1996 the money she received was paid into her personal bank account by TPS. It is not clear on the material what the nature of this payment was or whether it was paid to her by TPS on its own behalf or on behalf of the owners.

Crerar was told on July 2, 1996, in a telephone conversation with Rod Wiens, that her services were no longer required and she was being terminated.

TPS was, at the time Crerar was terminated, the property management company for the owners of the complex and Mr. Wiens was their Manager for the complex. During the investigation by the delegate, Mr. Wiens filed a submission saying he was acting on the instructions of two of three owners, Mr. Shahrvand and Mr. Adams when he terminated Crerar.

It is suggested in the material on file that the ownership of the complex had recently changed hands and TPS had not been engaged for long as the property management company when Crerar was terminated. At approximately the same time as Crerar was terminated the property management contract of TPS was brought to an end.

...

Even though Crerar worked at the complex for 4 years, there is nothing on file indicating when, how or by whom Crerar was hired or, during the 4 years, who supervised her work or to whom she reported. No T4 slips (if she was issued any T4 slips) were sought or provided, even though they might have assisted in identifying either or both the employer and the fact of employment. Similarly, no Record of Employment, which is required to be issued to an employee upon termination of employment, appears on file. Nor is there any other similar documentation supporting a conclusion of employment, either generally or with TPS.

The March 9, 1998 report added the following conclusions of fact, going to the issue of whether Crerar was an employee of TPS:

On April 22, 1996 Rod Wiens of TPS wrote to Masoud Shahrvand, an owner of Woodland Village, identifying problems with the property and making a proposal to manage the property (Attachment A"). TPS soon became the property management company for the owners of Woodland Village. The owners were Masoud Shahrvand, Darryl Adams and Frank Reddenback. In May, 1996, TPS began paying Crerar \$1200 per month as a resident manager of Woodland Village ("Attachment B"). On July 5, 1996 Wiens wrote to Crerar and her husband John Crerar, requesting them to give keys, records and other items to the new resident manager ("Attachment C"). The implication of this memo is that Crerar was terminated from her position by Wiens. Darryl Adams was interviewed on January 26, 1998 and he confirmed Wiens hired Crerar as manager of the property and terminated her on July 5, 1996. Adams stated that Wiens made these decisions without any involvement from the owners. (Adams is no longer shown as an owner of the property.) Reddenback is currently the sole owner of Woodland Village, according to municipal tax records of the Town of Port Alberni.

Crerar subsequently wrote to Wiens for reasons why she was fired ("Attachment D"). Wiens replied in an August 13, 1996 memo to John Crerar ("Attachment E"). Crerar did not receive a T4 or a Record of Employment from either TPS or the owners.

Following the outline of facts, an analysis of the issue of employment is provided:

From July 1992 to July 1996, Crerar was the resident manager at Woodland Village. Prior to TPS assuming the property management of Woodland Village, she was employed by Wescan Concepts of Victoria. When Shahrvand, Adams and Reddenback purchased the property, they contracted with TPS to manage the property. The evidence indicates that TPS offered continued employment to Crerar, the resident manager. Other than Wiens October 10, 1996 memo to Shahrvand and Adams, there is

no other indication that Crerar was an employee of the owners and not TPS. To reiterate, TPS offered her continued employment, paid her monthly salary and terminated her employment. Adams denies that the owners acted in any way as Crerar's employer. All direction and control of Crerar rested with TPS and, specifically Wiens.

I note, as I did in the first decision, that the above conclusion and the liability of TPS to Crerar for 4 years length of service compensation and vacation pay was reached without determining why the employment of Crerar should have been deemed to be "continuous and uninterrupted" from July, 1992 to July, 1996. In other words, the Determination, combined with the report still does not show what business was disposed of, what relationship Crerar had to that business and who assumed the business.

ANALYSIS

In *Lari Mitchell and others*, BC EST #D107/98, the Tribunal confirmed that the *Act*, being remedial legislation, would be given a large and liberal construction and noted 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. The Tribunal also noted that for the purposes of the *Act* the term "dispose" should be consistent with the *Interpretation Act*, R.S.B.C. 1996, c. 238 which defines that term 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;

While the concept of a disposition in the context of Section 97 of the *Act* is broad, it is not without its limitations. Section 97 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.*

The operation of Section 97 is contingent upon two findings of fact: one, that there is a disposition of a business or a substantial part of the assets of a business; and, two that there is employment with the "vendor" employer as of the date of the disposition. It is trite, in the context of the purpose for Section 97, that contract or commercial law analogies have limited relevance or usefulness. The argument of TPS that effect should be given to the "contract law of purchase and sale" is not a valid argument in light of the conclusion that Section 97 is intended to over-ride some of the consequences at common law on the employment relationship in the context of a disposition of a business.

Having said that, there is no support for the conclusion that TPS should have been deemed to be the employer. In a submission to the Tribunal dated August 8, 1998,

On the basis of all the information on file, there is no material showing that TPS ever hired Crerar or that they should be deemed her employer on the basis that they assumed a “*business or a substantial part of the entire assets of a business*” in respect of which Crerar was an employee. Accordingly, they are not responsible for length of service compensation or unpaid wages to her.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated July 2, 1997, be cancelled.

David Stevenson
Adjudicator
Employment Standards Tribunal