

**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 -

Giovanno (John) Valoroso and Carmen Valoroso  
operating as Primadonna Ristorante Italiano  
("Valorosos")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Cindy J. Lombard

**FILE NO.:** 1999/486

**DATE OF HEARING:** October 12, 1999

**DATE OF DECISION:** November 9, 1999

**DECISION**

**APPEARANCES**

Giovanno (John) and Carmen Valoroso (“Valorosos”) appeared on behalf of the employer, Primadonna Ristorante Italiano, and gave oral evidence.

The employees, Sylvia Revesz (“Revesz”) and Terry Smith (“Smith”) appeared and gave oral evidence.

**OVERVIEW**

This is an appeal by the employers, Valorosos, pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) of a determination of the Director of Employment Standards (the “Director”) issued on July 20, 1999.

**ISSUE TO BE DECIDED**

Whether the Valorosos are liable for compensation for length of service, most of which service was in the employ of the previous owner of the restaurant, pursuant to Section 97 and Section 63 of the *Act*,

**FACTS**

Revesz was employed in the capacity of a server from July 10, 1991, until July 1, 1997, when she says her employment was terminated by the Valorosos without notice or compensation for length of service.

Smith was employed from February 13, 1994, until July 7, 1997, when she says her employment was terminated without notice or compensation for length of service.

**ANALYSIS**

The Valorosos purchased the restaurant from O’Donals Restaurants of Canada Limited (O’Donals) with the sale completing on May 27, 1997.

By letter dated May 1, 1997, the employees were informed that the restaurant had been sold and that the Valorosos would take possession of the restaurant on May 21, 1997. The employees were furthermore advised that O’Donals would pay all employees up to and including May 21, 1997, including holiday pay.

The letter furthermore stated: “This letter is our notice of termination to all employees, that May 21, 1997 will be the last day of employment with O’Donals Restaurants of Canada Limited.” The letter furthermore stated that the Valorosos would interview employees for consideration of continued employment.

The Valorosos say that the sale was a sale of assets although it is not entirely clear from the evidence whether the sale was an asset sale or a sale of shares because only a few pages of the sale and lease documents were produced as follows:

- a) page 10 of the sale document, which includes paragraph 6.07 which states as follows:

6.07 Termination of Employees. The Vendor will, at the time of closing, terminate the employment of all employees and will indemnify and save harmless the Purchaser from and against all claims by any employee of the Vendor for wages, salaries, bonuses, pension or other benefits, severance pay, notice or pay in lieu of notice and holiday pay in respect of any period prior to the time of closing.
- b) page 20 of the sale document which is a schedule of chattels and equipment
- c) page 21 (a) which the Valorosos say was an attachment to the Lease which also includes various equipment and furniture.

It appears on the whole of the evidence submitted orally and written that this was an asset sale.

On May 21, 1997, O’Donals Restaurants issued Records of Employment to Revesz and Smith stating that the reason for termination was that the “store closed”.

Prior to the Valorosos taking over, they interviewed Revesz and Smith who wished to stay and hired them with their first day of employment being May 24, 1997.

Section 97 of the Act provides as follows:

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 purpose of this *Act*, to be continuous and uninterrupted by the disposition.”

In the case of an asset purchase, the purchaser can require as a condition of the sale that the asset vendor insure that all or some of the employees are terminated in accordance with Section 63 and, if applicable, Section 64 of the *Act*. In other words, this requires that the asset vendor give the employees in question appropriate written notice of termination or pay in lieu thereof or some combination of pay and notice in advance of

the completion of the sale. See for example the analysis of the effect of Section 97 of the *Act* in *Lari Mitchell et al*, BC EST #D314/97, July 25, 1997.

In this case, the contract of sale from O'Donals to the Valorosos did require that the vendor terminate the employment of all employees and indemnify and save harmless the Valorosos from any claims for severance or holiday pay.

On May 1, 1997, O'Donals gave all employees three weeks written notice of termination, ie. effective May 21, 1997. Furthermore, the termination was effective prior to the completion of the sale of the business on May 27, 1997.

Revesz was entitled to five weeks notice of termination or compensation for length of service while Smith was entitled to three weeks notice of termination or compensation in lieu of notice pursuant to Section 63 of the *Act*. Therefore, the written notice from O'Donals to Revesz and Smith dated May 1, 1997, constituted sufficient notice in the case of Smith but not in the case of Revesz who was entitled to an additional two weeks notice or compensation in lieu thereof.

Since Revesz' employment was terminated prior to the sale, Revesz, therefore, can only assert her rights as against the asset vendor, that is O'Donals. See for example, *Mitchell et al*, BC EST #D314/97, July 25, 1997.

For the foregoing reasons, the Appellant, Valorosos have discharged the onus of establishing that the Director made a fundamental mistake of law.

**ORDER**

Pursuant to Section 115 of the *Act*, we order that the Determination on this matter dated July 20, 1999, be cancelled.

---

**Cindy J. Lombard**  
**Adjudicator**  
**Employment Standards Tribunal**