

**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-

MacDonald & Wilson Ltd.

(“M & W” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 97/585

**DATE OF DECISION:** November 19, 1997

## DECISION

### OVERVIEW

This is an appeal brought by MacDonald & Wilson Ltd. (“M & W” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on July 17th, 1997 under file number ER 077-424 (the “Determination”).

The Director determined that M & W owed its former employee, Ken Booth (“Booth”), the sum of \$5,405.18 on account of unpaid vacation pay and eight weeks’ wages as compensation for length of service. In determining that Booth was entitled to eight weeks’ wages as compensation for length of service, the Director relied on section 97 of the *Act* which provides that an employee’s tenure is deemed to be unaffected by a sale of the business or a substantial part of the assets of the business.

### FACTS

#### *The Director’s Position*

According to the information set out in the Determination, Booth was hired in September 1985 to be the plant manager of a firm known as Mega Packaging Inc. (“Mega”). Apparently this firm became insolvent on or about April 30th, 1996 and W & W acquired some of the business assets formerly owned by Mega. M & W then moved the business to a new location although the basic operations continued under the M & W’s banner much as they formerly had when Mega was in business.

Mega formerly was, and M & W currently is, engaged in the business of packaging fruit juices. The two firms had at least one common officer/director and Booth’s employment was continuous and uninterrupted by the sale of the assets. Booth was terminated, without cause or notice on May 15th, 1997. M & W does not dispute that it owes Booth termination pay reflecting the period of time that he was in their direct employ. M & W says that it should not be responsible for any wages that accrued while Booth was employed by Mega and that any termination pay should only be based on Booth’s tenure with M & W.

#### *M & W’s Position*

M & W’s position on appeal is set out in a letter to the Tribunal dated August 1st, 1997 under the signature of the firm’s president, Mr. Patrick G. Davies. According to the information provided by Mr. Davies, Booth was hired by Mega in 1985 to be the manager of its packaging plant situated in Cloverdale, B.C. Davies was the president and a 50% shareholder in Mega; Mr. Borge Olstrom held the other 50% of Mega’s shares.

Mr. Davies has been an officer and shareholder in M & W since 1973. The other principal in M & W is one Barry Gaynor who holds 49% of the issued shares; Davies and/or his wife hold 51% of the W & W shares.

In 1994, M & W decided to have Mega package an M & W drinking water product branded under the name "Cascade" in an effort to "prop-up" the profitability of Mega. The two principals of M & W arranged for Mega to purchase or otherwise acquire some additional equipment that would be used in the "Cascade" operation. The effort to rescue Mega from its mounting losses ultimately failed. Sometime later the bank which held mortgage security on the property where Mega's operations were situated took foreclosure proceedings; other creditors then claimed all other Mega assets. So far as I can gather, Mega was either petitioned or made a voluntary assignment into bankruptcy. In any event, at this point Mega was an insolvent firm.

In or around the time of the Mega insolvency, M & W relocated its plant. The equipment owned by M & W was relocated to the new location where the "Cascade" packaging operations continued under M & W's direct control. M & W also acquired some of Mega's assets from a salvage company. In 1997, M & W's landlord closed down M & W's business operations via a distress warrant. M & W has been defunct since that time and is now insolvent.

M & W alleges that Booth's "termination was caused by circumstances beyond our control" and specifically refers to a chain of various unfortunate circumstances--commencing with the failure of the major customer of Mega--that ultimately led to the closing down of the business in the spring of 1997.

## **ISSUES TO BE DECIDED**

M & W's appeal raises, if only obliquely, two issues. First, is Booth entitled to eight weeks' wages as compensation for length of service? Second, did the Director err in determining that M & W was a "successor" of Mega within section 97 of the *Act*?

## **ANALYSIS**

### *Booth's Termination*

Despite M & W's assertion that Booth's termination resulted from "circumstances beyond our control", only a few narrow circumstances are set out in the *Act* where compensation for length of service is not payable. For example, in section 63 of the *Act*, compensation is not payable if appropriate written notice was given, if the employee voluntarily resigned or if the employer had just cause for termination. None of these exceptions applies here.

Section 65 of the *Act* also sets out some circumstances where no compensation is payable; the only possibly applicable provision being subsection 65(1)(d) which provides as follows:

**65.** (1) Sections 63 and 64 do not apply to an employee...

(d) employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the *Bank Act* (Canada) or a proceeding under an insolvency Act...

However, in my opinion, the foregoing subsection cannot apply here because Booth's loss of employment was due to M & W's insolvency which crystallized when the landlord's distress warrant was executed and the business was consequently closed down.

*The Successorship Issue (Section 97)*

The employer concedes that Booth's employment continued, without interruption, when the "Cascade" packaging operations formerly undertaken by Mega were transferred to M & W. The evidence is that M & W continued more or less the same operations, albeit from a different location, using many of the same assets that were formerly utilized in the Mega operations. In light of these circumstances, I am entirely satisfied that the Director did not err in finding that M & W was a "successor" employer under section 97 of the *Act*.

I might add, although it is not necessary to do so, that the Director might have equally chosen to proceed under section 95 of the *Act*, in which case M & W would still have been held liable for Booth's unpaid vacation and termination pay.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination in this matter be confirmed as issued in the amount of \$5,405.18 together with whatever further additional that may have accrued since the date of issuance pursuant to section 88 of the *Act*.

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**Kenneth Wm. Thornicroft, *Adjudicator***  
**Employment Standards Tribunal**