

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 -

Dharampal Gill

("Gill")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/539

DATE OF HEARING: December 1, 2000

DATE OF DECISION: January 02, 2001

DECISION

APPEARANCES:

Dharampal Singh Gill	on his own behalf
Bichtar S. Mahal, Chartered Accountant & Avtar Sidhu, President/Director	for Mehar Forest Products Ltd.
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal filed by Dharampal Singh Gill (“Gill”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 18th, 2000 under file number ER#062-601 (the “Determination”).

Gill’s appeal was heard at the Tribunal’s offices in Vancouver on December 1st, 2000 together with an appeal of the same Determination filed by Gill’s former employer, Mehar Forest Products Ltd. (“Mehar”)--see EST File No. 2000/549. My reasons for decision in the Mehar appeal are being issued concurrently with these reasons under B.C.E.S.T. Decision No. D560/00. Gill, who testified via a Punjabi interpreter, appeared as the sole witness on his own behalf; Mehar’s president, Avtar Sidhu, and its accountant, Mr. Bichtar Mahal, appeared and made submissions on Mehar’s behalf. The Director was not represented at the appeal hearing.

THE DETERMINATION

The Director’s delegate determined that Mehar owed Gill, its former employee, the sum of \$3,719.45 on account of unpaid wages including overtime pay (the largest component of Gill’s award), statutory holiday pay, one week’s wages as compensation for length of service and concomitant vacation pay and interest.

In awarding Gill one week’s wages as compensation for length of service, the delegate specifically rejected Gill’s assertion that his length of service ought to be calculated as and from September 2nd, 1997. Rather, the delegate accepted Mehar’s position that Gill’s service commenced on April 16th, 1999. It is common ground between the parties that Gill’s employment ended on or about October 5th, 1999. Accordingly, the delegate determined that Mehar was not liable to Gill for any unpaid wages (including vacation pay) that were earned or payable prior to April 16th, 1999 and that Gill was entitled to only one week’s wages as compensation for length of service (rather than two weeks’ wages).

The relevant portions of the Determination (at pages 3 and 6) are reproduced below:

at page 3:

“[Gill] worked for Pacific Lumber Remanufacturing Inc. from September 02, 1997 until April 15, 1999 and was laid off, then hired by [Mehar] on April 16, 1999 until October 05, 1999. [Gill] provided a record of employment indicating that he was employed with [Mehar] for the duration of his wage claim, September 02, 1997 to October 05, 1999.

[Mehar] stated that they are a separate company from Pacific Lumber Remanufacturing Inc. and the record of employment does not reflect a relationship which would make them liable for all hours being claimed. [Mehar] stated that they did not purchase assets, nor is there control and direction of one company over the other, nor do they have common director’s [sic] /officers. My investigation into the corporate status of both Pacific Lumber Remanufacturing Inc. and [Mehar] confirmed that no association exists.

As a result of these findings I am not accepting [Gill’s] position that both Pacific Lumber Remanufacturing Inc. and [Mehar] are associated companies. I subsequently [sic, consequently?] agree with [Mehar] that they are only liable for wages earned between April 16, 1999 and October 05, 1999...”

at page 6:

“[Gill] claims that he worked for [Mehar] from September 02, 1997 until October 05, 1999. However this claim cannot be proven. As per Section [sic] 95 and 97 I am unable to find evidence that associates the two companies by the purchase of assets, control and direction and/or shared or common directors. Therefore, [Mehar] is only liable for wages earned and not paid between April 16, 1999 and October 05, 1999.”

THE APPEAL

Gill says that the delegate erred in determining his length of service and, thus, did not award him all of the compensation to which he was entitled under the *Act*. The Determination and this appeal both raise issues with respect to sections 95 and 97 of the *Act* which are set out below:

Associated corporations

95. If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,

- (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and

(b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

Sale of business or assets

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.

FINDINGS AND ANALYSIS

Summary of the evidence and submissions

The evidence presented by Mehar (which is largely uncontradicted) shows that Pacific Lumber Remanufacturing Inc. (“Pacific Lumber”) operates a sawmill in Surrey. Another company, Mountain View Specialty Products & Reload Inc. (“Mountain View”), operates a sawmill in Aldergrove. In addition to its own sawmill operation, Pacific Lumber apparently served as a form of “labour contractor” supplying labour to Mountain View.

Gill was one of some 35 Pacific Lumber employees who worked at Mountain View’s sawmill in Aldergrove (Mountain View employed another 25 or so of its own employees at the same plant). From September 2nd, 1997 until April 15th, 1999, Gill worked at Mountain View’s Aldergrove sawmill (and *only* at that location), using its machinery, equipment and inventory, and was paid by way of a Pacific Lumber payroll cheque. Gill was supervised by Mr. Sidhu who was then Pacific Lumber’s foreman responsible for the Pacific Lumber employees who worked at Mountain View’s Aldergrove sawmill. Indeed, it was Mr. Sidhu who originally hired Gill in the late summer of 1997.

As I understand the situation, Pacific Lumber became dissatisfied with the arrangements between it and Mountain View; Pacific Lumber wished to cease acting as a labour contractor so that it could concentrate on its own Langley operations. When Mr. Sidhu became aware of the situation, he approached Mountain View and enquired if he might “take over” the labour supply contract. Mr. Sidhu testified that he reached a verbal agreement with Mountain View whereby he would cause a new company to be incorporated (this turned out to be Mehar) that would continue to supply the labour that had previously been supplied to Mountain view by Pacific Lumber.

Mr. Sidhu then approached all of the Pacific Lumber employees, including Gill, and advised them that he (or, I suppose more correctly, Mehar) would continue as their employer. Mr. Sidhu assured these employees that they would continue in the same jobs, working under the same terms and conditions, at the Mountain View sawmill. Mr. Sidhu testified that he told the Pacific Lumber employees that “I will be taking over the contract” and that he would be their new employer; none of the employees objected and all continued on with Mehar. Mr. Sidhu, for his part, continued on as the employees’ supervisor.

Mr. Gill agreed with Mr. Sidhu that his employment continued unchanged in all material respects (same job, same plant, same supervisor) but he denied having ever been spoken to by Mr. Sidhu

prior to the changeover in mid-April 1999. Mr. Gill stated that “no one said anything to me” and that the only noticeable change was that his payroll cheques were now being drawn on a Mehar, rather than a Pacific Lumber, account.

It is perhaps important to note that Gill’s (as well as the other former Pacific Lumber employees’) employment continued uninterrupted; none of the employees received a notice of termination from Pacific Lumber and records of employment were not issued at the time of the changeover. The employees never received any written notification with respect to the changeover and there is a dispute in the evidence as to whether or not Mr. Gill received any verbal notice prior to the changeover. Neither Mr. Gill, nor any other employee so far as I can determine, was formally “hired” by Mehar (for example, by proceeding through an application/hiring process and completing necessary government-mandated paperwork (*e.g.*, a TD-1 form) in mid-April 1999.

In his written submission to the Tribunal dated August 29th, 2000, Mehar’s accountant and agent, Mr. Mahal, described the relevant events as follows:

“[Pacific Lumber] had a contract with [Mountain View] to provide services. This contract was terminated, thus, [Pacific Lumber] laid off its employees (related to this contract), including Mr. Gill, on April 15, 1999. [Mehar] took over this contract and hired Mr. Gill, on April 16, 1999.”

I should note, by way of response to the above submission, that there is no evidence before me that Gill was ever “laid off” by Pacific Lumber or that he was, in any formal sense, “rehired” by Mehar. It should be recalled that Gill never received any written or verbal notice from Pacific Lumber advising him that he was being either laid off or terminated as of April 15th, 1999. On the other hand, the notion of Mehar having “taken over” the Pacific Lumber labour supply contract was expressed by both Mr. Sidhu in his testimony and by his agent, Mr. Mahal, in his written submission to the Tribunal. Further, four identical one-page typewritten statements were submitted by Mehar (obviously prepared by Mehar for their employees’ signature) and all state that:

“I [current Mehar employee] confirm that I was told, by Mr. Avtar Sidhu, that Mehar Forest Products Ltd. had *taken over the contract* at Mountain View Specialty & Reloading Inc. from Pacific Lumber Remanufacturing Inc. on April 16, 1999.

I was also told that there would be no disruption in my employment and that I would be performing the same work...”

(*my italics*)

I shall return to the notion of Mehar having “taken over” the Pacific Lumber labour supply contract later on in these reasons as I believe that to be a significant point.

As noted by the delegate in the Determination, there are two separate statutory provisions by which Mehar could be held liable for any unpaid wages earned by, or payable to, Gill prior to April 16th, 1999, namely, section 95 (sometimes called the “common employer” provision) and

section 97 (sometimes called the “successorship” provision). I shall now address each of those provisions in turn.

Section 95: Associated Corporations

If a business enterprise is being carried on through two or more separate corporations *under common control or direction*, those two corporations can be treated as a single employer for purposes of the *Act* in which case both corporations will be “jointly and separately (severally)” liable for the unpaid wages of an employee of either corporation. Thus, if Pacific Lumber and Mehar were under common direction or control, a section 95 declaration might be appropriate in which case Mehar would be jointly and severally liable for any unpaid wage claim that crystallized while Gill was employed by Pacific Lumber.

The delegate, during the course of his investigation, was unable to uncover any evidence indicating that the two companies were under common direction and control. Similarly, there is no such evidence before me. Pacific Lumber is controlled by one Rajdeep Sohi, its sole shareholder, officer and director; Mehar is controlled by Mr. Sidhu and he is Mehar’s sole officer, director and shareholder. There is no evidence before me that Mr. Sidhu and Mr. Sohi stand in anything other than an arm’s length relationship to each other as do the two respective corporations that they control. Mehar was incorporated by Mr. Sidhu on March 18th, 1999 to serve as the corporate vehicle that would “take over” Pacific Lumber’s labour supply contract with Mountain View.

In my view, the delegate did not err in refusing to make a section 95 declaration with respect to Pacific Lumber and Mehar and, accordingly, I would confirm that aspect of the Determination. I now turn to the successorship issue.

Section 97: Sale of Business or Assets

In interpreting section 97, one must remain cognizant of the fact that employment standards legislation in general, and this provision in particular, must be given such fair, large and liberal construction as best insures the attainment of its objects--see *Machtinger v. HOJ Industries Ltd.* [1992] 1 S.C.R. 986; *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27; *Helping Hands Agency Ltd. v. B.C. Director of Employment Standards* (1995), 15 B.C.L.R. (3d) 217 (B.C.C.A.)

The purpose of section 97 of the *Act* is to preserve the employment status of employees when their employer’s business (or their employer’s business assets) is sold or otherwise transferred (“disposed of”) to a third party. This provision is sometimes referred to as a “successorship” provision in that it creates certain ongoing employment rights and entitlements for employees who continue to work for the subsequent or “successor” employer following the sale of the business or a substantial part of the business assets.

Section 97 is triggered when the individual in question is an “employee of the business” on the date of the disposition. The disposition itself does not terminate the employment relationship; the employment relationship merely continues with the successor employer being, in effect, substituted for the previous employer as the employer of record. This is not to say that the new employer *must* continue to employ all of the employees of the former employer. However, unless appropriate arrangements are made so that the employment of such persons is terminated

on or before the disposition is completed, those employees continue on as employees of the new employer and retain all of their accrued rights and entitlements (including service-based benefits), but only insofar as the *Act* is concerned, vis-à-vis the new employer--see *Helping Hands Agency Ltd. v. B.C. Director of Employment Standards* (1995), 15 B.C.L.R. (3d) 217 (B.C.C.A.).

It seems clear that Gill was an employee of Pacific Lumber as of April 15th, 1999. Despite Mehar's assertion to the contrary, there is no evidence before me that Gill's employment with Pacific Lumber was, in fact, *terminated* prior to Mehar "taking over" (recall that this is Mehar's characterization of the circumstances) the labour supply contract effective April 16th, 1999. Evidence regarding whether or not Pacific Lumber actually terminated Gill's employment prior to April 16th, 1999 could have been provided by Pacific Lumber, however, there is no such evidence before me. The *only* evidence before me from Pacific Lumber is a one paragraph letter from its self-described "owner", Randy Molnar, in which he states that the *contract* with Pacific Lumber was "terminated and awarded to Mehar" on April 16th, 1999; there is no mention of any Pacific Lumber *employees* having been terminated either on or before April 16th.

Gill, for his part, says that he was never terminated--either on or before April 15th, 1999--by Pacific Lumber. Mehar, of course, takes the position that Gill's employment was terminated but such an assertion merely amounts to hearsay evidence and thus has limited, if any, probative value. It should be recalled that in their written statements, the four Mehar employees all stated they were told by Mr. Sidhu "there would be no disruption" in their employment as a result of Mehar having "taken over" the labour supply contract at Mountain View. None of these employees indicated that he had been terminated and rehired; rather, all stated their employment would continue unaffected by the changeover from Pacific Lumber to Mehar.

Even though it would appear that the Pacific Lumber employees', including Gill's, employment continued unaffected by the changeover, section 97 is not implicated unless there is a "disposition" of "all or part of a business or a substantial part of the entire assets of a business". Was there such a disposition in this case?

As previously noted, Pacific Lumber operated its own sawmill and, in addition, acted as a "labour contractor" supplying labour to Mountain View's Aldergrove sawmill. Insofar as this latter aspect of Pacific Lumber's operations is concerned, the actual labour supply contract with Mountain View (which, I understand, was a verbal agreement) was the only real asset (a *chose in action*, but an asset nonetheless) held by Pacific Lumber. The evidence before me suggests that it was this asset, or perhaps more accurately, Pacific Lumber's entire labour contracting "business" that was "disposed of". It seems clear that the common intention of all of the parties--Pacific Lumber, Mehar and Mountain View--was that Pacific Lumber would no longer act as a labour supplier to Mountain View and that Mehar would continue on in Pacific Lumber's place and stead. I find it compelling that Mehar, as well as the employees who were affected by the disposition, all indicated that Mehar was simply "taking over" the labour supply contract from Pacific Lumber and that there would be no "disruption" in the employees' employment.

Pacific Lumber did not terminate the employment of its "Mountain View" employees, including Gill, prior to the disposition of the labour supply contract; Gill's, and the other employees', employment continued unaffected by the changeover save for the identity of their employer. Since they were Pacific Lumber employees as of the date of the disposition, by virtue of section

97 of the *Act*, their employment was “deemed, for the purposes of the *Act*, to be continuous and uninterrupted by the disposition”. Thus, in the case of Gill, his employment with Mehar, for the purposes of the *Act*, commenced as of his original date of hire by Pacific Lumber, *i.e.*, September 2nd, 1997, and it follows that his overtime pay, statutory holiday pay, vacation pay and compensation for length of service claims ought to have been determined accordingly (subject to the strictures of section 80).

Summary

The delegate did not find any evidence indicating that Pacific Lumber and Mehar were under common direction and control such that both firms would be jointly and severally liable for Gill’s entire unpaid wage claim. Similarly, there is no evidence before me to support a section 95 declaration that Pacific Lumber and Mehar are “associated corporations”.

On the other hand, I am of the view that the delegate erred in concluding that Mehar was not a “successor” firm under section 97 of the *Act*. It follows from the foregoing that, in my view, the delegate erred in concluding that Mehar was “only liable for wages earned and not paid between April 16 and October 05, 1999”.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied such that Gill’s employment with Mehar is determined, in accordance with section 97 of the *Act*, to have been continuous and uninterrupted as and from September 2nd, 1997. Accordingly, this matter is hereby referred back to the Director solely for the purpose of calculating Gill’s entitlement in accordance with the findings and directions set out herein.

KENNETH WM. THORNICROFT

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal