

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 -

Piney Creek Logging Ltd.
("Piney Creek")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 98/646

DATE OF DECISION: December 8, 1998

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Piney Creek Logging Ltd. (“Piney Creek”) of a Determination which was issued on September 22, 1998 by a delegate of the Director of Employment Standards (the “Director”). In that Determination the Director found Piney Creek had contravened Sections 36(1), 40(1), 58(1) and 63(2) of the *Act* in respect of the employment of Keith Kirby (“Kirby”) and, pursuant to Section 79 of the *Act*, ordered Piney Creek to pay an amount of \$11,104.54.

Piney Creek has not appealed the conclusion and calculation of the Director relating to the contravention of Section 36(1) (hours free from work) nor Section 40(1) (overtime wages for an employee not on a flexible work schedule). Neither has it appealed the conclusion that Kirby is owed vacation pay, but argues his entitlement under Section 58(1) ought to have been 4% of total wages earned by him in the period from October 13, 1996 to February 17, 1997, not 6% as determined by the Director.

The position of Piney Creek in respect of vacation pay entitlement also reveals its fundamental position in this appeal, which is that any obligation it had to Kirby under the *Act* ought to be confined to his actual period of employment with Piney Creek and ought not to include his employment with Twin Star Contracting Ltd. (“Twin Star”), a company acquired by Piney Creek in, or about, October, 1996.

Piney Creek also raises an argument concerning the interest calculation on the amounts found owing under the *Act*.

The Tribunal has reviewed the appeal and has decided an oral hearing is not required in this case.

ISSUES TO BE DECIDED

There are two issues raised by this appeal. The first is whether the Director erred in determining that Kirby’s length of employment, for the purpose of calculating vacation pay and length of service compensation under the *Act*, included his employment with Twin Star. The second issue is whether the Director, when calculating the interest under Section 88 of the *Act*, should have taken into account what Piney Creek asserts was a delay of 1½ years from the date of the complaint to the issuing of the Determination.

PRELIMINARY MATTER

Piney Creek, as a preliminary matter, requested the Tribunal to issue a “Third Party Notice” to Twin Star. This request is stated in the submission of counsel for Piney Creek as follows:

As a final matter, Piney Creek Logging Ltd. respectfully requests the tribunal allow for the issuing of the Third Party Notice as against Twin Star Contracting Ltd. in order to properly determine the arguments raised above. In essence, the argument raised above is requesting that the tribunal determine the paramountcy between the crystallization of an employee’s rights once terminated and the statutory successorship rights established in Section 97.

In my opinion, it is neither appropriate nor necessary to involve Twin Star in this appeal, which raises an issue of whether the Director erred in determining Kirby’s length of employment with Piney Creek for the purposes of the *Act*. The liability of Twin Star under the *Act* is not at issue and the Tribunal has no jurisdiction to determine, as a matter of first instance, whether Twin Star has contravened the *Act*.

FACTS

The essential facts relevant to this appeal can be determined from the file. With some minor adjustments, I adopt the following facts from the appeal submission filed by counsel for Piney Creek:

1. Kirby worked for Twin Star Contracting Ltd. for approximately 18 years.
2. On October 11, 1996, Twin Star Contracting Ltd. issued an R.O.E. indicating his employment with that company was terminated effective Friday, October 11, 1996 (we do not have a copy of the R.O.E.).
3. Piney bought not only Twin Star’s equipment but also purchased a logging agreement with Canadian Forest Products Ltd., Netherlands Division. Enclosed with this submission is a copy of the Agreement and Covenant effective the 1st day of November, 1996.
4. Kirby was hired by Piney on October 13, 1997.
5. Kirby was terminated without cause and without notice on February 9, 1997, by Piney.
6. Kirby filed a complaint February 17, 1997, pursuant to the *Employment Standards Act*.

7. There is no written agreement for sale of the assets of Twin Star Contracting Ltd.

There are three aspects of the above statements of fact that require comment or clarification. First, the R.O.E. referred to in point 2 was issued October 22, 1996, not October 11. Second, I do not accept the suggestion found in point 2 that the record of employment indicates Kirby's employment with Twin Star was for the purposes of the *Act*, "terminated". The reason stated for issuing the R.O.E. was identified as code "K" and the R.O.E. contained the following comment:

We sold our logging contract. Keith Kirby is still employed by them.

Third, the Director also attached a copy of an undated, hand written document suggesting there was a written agreement to sell certain assets of Twin Star to Piney Creek, specifically some equipment, which is listed, and "other miscellaneous tools and equipment relating to the above [logging contract]".

ANALYSIS

Section 97 of the *Act* 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 by the disposition.*

Piney Creek argues that Kirby was terminated by Twin Star on October 11, 1996, which is the last day of work indicated on the record of employment issued by Twin Star to Kirby on October 22, 1996. As a result, Kirby had a claim against Twin Star for length of service compensation and that claim superseded any right he might have acquired by operation of section 97. Piney Creek relies on the following comment from *Lari Mitchell and others and B.C. Systems Corporation and Public Sector Employers Council*, BC EST #D314/97:

Section 97 is triggered when there is a sale of business assets and no concomitant termination of employment prior to the completion of the sale. In such circumstances, the employees' existing rights under the *Act* are merely transferred from the asset vendor (their former employer) to the asset purchaser (their new employer). If, prior to the sale, the asset vendor terminates the employees (say as a condition of the sale agreement), the employees may then only assert their rights under the *Act* as against the asset vendor.

That argument depends entirely on whether, for the purposes of the *Act*, Kirby was “terminated” by Twin Star prior to the disposition of its business to Piney Point. Otherwise, the following statement from that decision would apply:

Section 97 is triggered as long as the individual in question is “an employee of the business” as at the date of the asset sale. The asset sale itself does not terminate the employment relationship; the employment relationship continues with the asset purchaser being, in effect, substituted for the asset vendor as the employer of record.

(page 6)

In its reconsideration of BC EST #D314/97, *Lari Mitchell and others and B.C. Government Service Employees’ Union*, BC EST #D107/98 (Reconsideration of BC EST #D314/97), the Tribunal noted that the use of terms such as “sale” and “completion of the sale” are not consistent with the broader application of the language used in section 97:

We note that the language of section 97 is broad in scope. Although it is natural to speak of section 97 in relation to the “sale” of a business, it is the word “disposed” that is used in the legislation. Section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 defines “dispose” 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;

The point we wish to make is 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.

(pages 10-11)

There is no evidentiary basis for arguing that Kirby was, for the purposes of the *Act*, terminated by Twin Star prior to the disposition of its business and assets to Piney Creek. Counsel for Piney Creek says the issuance of the record of employment by Twin Star to Kirby constitutes a termination. I do not agree. The issuance of a record of employment is a statutory requirement under federal legislation whenever there is an interruption of earnings as that term is defined under the *Employment Insurance Act Regulations*. In my opinion, the issuance of a record of employment is a neutral fact under the *Act*. What is more critical in the circumstances of this case is that Kirby’s employment continued from Twin Star to Piney Creek during the disposition. The Tribunal indicated in its reconsideration decision *Lari Mitchell* (BC EST #D107/98) that such a fact pattern as is present here represents “the simplest case” for the application of section 97:

The simplest case occurs when the vendor sells the business and the vendor's employees continue to work for the purchaser. In that situation, we think it safe to say there would be no dispute about the application and interpretation of section 97. The purchaser "steps into the shoes of the vendor" and is required to honour the employees' length of service with the vendor and assume all of the vendor's liabilities and obligations under the *Act* towards the employees (see: *Helping Hands Agency Ltd. v. Director of Employment Relations*, (1995) 15 B.C.L.R. (3d) 27 (B.C.C.A.)).
(page 20)

The appeal on the first issue fails.

Counsel for Piney Creek also appeals the addition of interest to the wage entitlement calculation made by the Director. Section 88 of the *Act* contains the provisions relating to payment of interest. Subsection 88(1) of the *Act* is the relevant part of that provision and it states:

88. (1) *If an employer fails to pay wages or another amount to an employee, the employer must pay interest at the prescribed rate on the wages or other amount from the earlier of*
- (a) *the date the employment terminates, and*
 - (b) *the date a complaint about the wages or other amount is delivered to the director*
- to the date of payment.*

The requirement to pay interest on wages or other amounts payable to an employee is mandatory. There is no discretion in the Director or in the Tribunal to alter the requirement nor is there any statutory provision that would allow this requirement to be waived or adjusted for reasons of delay. This ground of appeal also fails.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 22, 1998 be confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal