Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Mehar Forest Products Ltd.
("Mehar")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David B. Stevenson

FILE No.: 2001/799

DATE OF DECISION: January 22, 2002

DECISION

OVERVIEW:

Mehar Forest Products Ltd. ("Mehar") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision of the Tribunal, BC EST #D544/00 (the "original decision"), dated January 2, 2001. Mehar says the original decision contains an error of law in the manner Section 97 of the *Act* was interpreted and applied to the circumstances.

This application for reconsideration has been filed in a timely way.

ISSUE

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the substantive issues raised in this application is whether the original decision was correct in the application of Section 97 of the *Act*.

ANALYSIS OF THRESHOLD ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116, which provides:

116. (1) On application under subsection (2) or on its own motion, the tribunal may

(a) reconsider any order or decision of the tribunal, and

(b) cancel or vary the order or decision or refer the matter back to the original panel.

(2) The director or a person named in a decision or order of the tribunal may make an application under this section.

(3) An application may be made only once with respect to the same order or decision.

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is *"to provide fair and efficient procedures for resolving disputes over the interpretation and application"* of its provisions. Another stated purpose, found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the

Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also be made of the merits of the Adjudicator's decision. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

FACTS

An outline of the key facts is helpful in order to place the arguments and analysis in a factual context.

In September 1997, the complainant, Dharampal Gill, was hired by Pacific Lumber Remanufacturing Inc. ("Pacific Lumber") to work at a sawmill in Aldergrove, B.C., which was owned and operated by Mountain View Specialty Products & Reload Inc. ("MountainView"). The services of the complainant were provided to Mountain View by Pacific Lumber under a verbal 'labour contracting' arrangement wherein Pacific Lumber provided approximately 35 of its employees to work at Mountain View's sawmill. Pacific Lumber also operated its own sawmill in Surrey, B.C. The arrangement between Pacific Lumber and Mountain View existed from September 2, 1997 to April 15, 1999. Between September 1997 and October 5, 1999, the complainant worked only at the Mountain View Sawmill.

Pacific Lumber became dissatisfied with the arrangement and, in the words of the original decision, "wished to cease acting as a labour contractor". Avtar Sidhu, who was, from September 1997 to April 15, 1999, Pacific Lumber's foreman at Mountain View, became aware of this situation and inquired of Mountain View whether he might "take over" the labour contract. A verbal agreement was reached where Mr. Sidhu would create a new company, which turned out to be Mehar, and that company would continue to supply the labour that had previously been supplied by Pacific Lumber.

According to Mehar, sometime before April 15, 1999, Mr. Sidhu approached all, or substantially all, of the Pacific Lumber employees working at Mountain View, advised them he was "taking over the contract" and that the new company, Mehar, would continue to employ them in the same jobs under the same terms and conditions as they had with Pacific Lumber. Mehar assumed the contract on April 16, 1999, which was also found to be the effective date of the complainant's employment with Mehar, although the original decision also finds there was no formal termination of the complainant's employment from Pacific Lumber nor any formal 'hiring' of the complainant by Mehar.

On or about October 5, 1999, the complainant's employment was ended.

ARGUMENT AND ANALYSIS

For reference, Section 97 of the *Act* is headed 'Sale of business or assets' and 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.*

The adjudicator of the original decision found the labour contract to be both an asset and a part of the business of Pacific Lumber. That conclusion, quite correctly, is not challenged by Mehar in this application. The thrust of the argument made by Mehar in this application is that the view taken of Section 97 in the original decision was too broad and on a proper interpretation there was no disposition under Section 97 of the *Act*, between Pacific Lumber and Mehar. In essence, Mehar argues that Section 97 should only be applied in the context of a sale, where one party who has control over an asset or part of a business transfers that control to another. Mehar approaches this argument from three directions.

First, Mehar argues that the interpretation given Section 97 in the original decision is out of line with the guiding principles of statutory interpretation approved by the Supreme Court of Canada decision *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27:

> Today there is only one principle or approach, namely, the words of an Act are to read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Second, Mehar argues that the view taken in the original decision is inconsistent with judicial pronouncements on the preconditions and scope of the language found in Section 97 (or its predecessor) of the *Act*. Third, Mehar says interpretation of Section 97 of the *Act* given by the original decision offends the concept of privity of contract.

This application does not raise any matter that warrants reconsideration and is denied. I am not convinced there is any error of law in the original decision.

The original decision is consistent with the approach taken by the Tribunal relating to the scope of the language used in Section 97. In the Tribunal's reconsideration decision *Lari Mitchell and others*., BC EST #D107/98 (Reconsideration of BC EST #D314/97), the following point was made:

> 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. Throughout this decision, for the most part, we use the word "disposition". For ease of reference we will refer to the "vendor" (the employer who disposes of the business) and the "purchaser" (the employer who acquires the business).

The original decision conforms to the legislative purpose behind Section 97. In the same decision, the Tribunal expressed its view of the purposes of Section 97 of the *Act* in the following excerpt:

> In our view, the purposes of section 97 are as follows. First, it ensures that a purchaser must credit employees with all statutory benefits acquired by reason of length of service with the vendor. These benefits include the right to compensation for length of service based on the totality of the employee's service to the vendor and the purchaser, the right to vacations and vacation pay based on the employee's total length of service and the right to statutory holiday pay without having to again complete 30 calendar days of employment. Second, by virtue of section 97, a purchaser must assume all of the liabilities and obligations that the vendor had towards its employees under the Act. . . . Third, upon a disposition, section 97 preserves "conditions of employment", which if substantially altered by the purchaser, triggers section 66 of the Act. One of the most significant aspects of section 97 is that it preserves all of an employee's employment rights as against the purchaser.

An argument made by Mehar in this application is that the view of the original decision is contrary to, and consequently precluded by, the decisions of the Court in *Helping Hands Agency Ltd. v. Director of Employment Standards* (1995), 15 B.C.L.R. (3d) 27 (B.C.C.A.) (*"Helping Hands"*) and *Mitchell v. Director of Employment Standards* [1998] B.C.J. No. 3005 (B.C.S.C.) (*"Mitchell"*). I disagree. There is no inconsistency between the decision of the Court in the cases cited and the original decision. The following comments from the reconsideration decision

in *Lari Mitchell and others*, *supra*, relating to the *Helping Hands* decision have some relevance to this argument:

> We have concluded that there are several reasons why *Helping Hands* does not preclude the original panel's interpretation of section 97.
>
> First, the facts in the *Helping Hands* case were different from the facts in this case. In *Helping Hands* the Court was concerned with the claims of employees who had actually gone to work for the purchaser employer. The Court was not required to address a situation where the vendor's employees refused employment with the purchaser employer. Nor was the Court required to decide at what point the employment was deemed continuous and uninterrupted.
>
> Second, section 13(2) of the *Ontario Employment Standards Act* is worded very differently than section 97 of the B.C. *Act*. It begins with the words: "Where an employer sells his business to a purchaser who employs an employee of the employer". Those very words plainly mean that before section 13(2) can have any application, the purchaser must have employed an employee of the vendor employer.
>
> Third, Mr. Justice Legg did not state that the preconditions of section 96 are identical to the preconditions of section 13(2). Mr. Justice Legg said: "The preconditions of s. 96 are similar to the preconditions of s. 13(2)." (emphasis added; at page 34)

In this case the key legal and factual issues before the adjudicator of the original decision were different than in either *Mitchell* and *Helping Hands*. There was no issue in either of those cases about whether a disposition had occurred. That conclusion was accepted. In *Helping Hands*, there was a sale of the client lists belonging to Caring Hearts Health Services Inc. to Helping Hands. In *Mitchell*, there was a restructuring by the provincial government of British Columbia Systems Corporation which resulted in a transfer of a substantial portion of the assets and of a large part of the business of that entity to the B.C. Government. Both of those transactions clearly fell within the statutory meaning of dispose and the scope of the provision in that sense was not analysed. Mehar argues:

> It is clear from a reading of both *Mitchell* and *Helping Hands* that both respective courts considered the application of the current s. 97 of the *Act* to flow only out of a sale from one party to another of some asset of the business including its employees.

That is incorrect, and most certainly was not the case in *Mitchell*. Beyond that, if the legislature had intended to limit the application of Section 97 to 'a sale', they could easily have done so by adopting wording such as are found in the Ontario legislation - "Where an employer sells . . . ", but it did not, opting for the broader language, "dispose".

Nor am I persuaded that the concept of privity of contract should determine the interpretation placed on Section 97 of the *Act*. In fact, application of the *Act* frequently interferes with common law rights, principles or concepts. In *Lari Mitchell and others*, *supra*, the Tribunal noted that the plain language of Section 97 abrogates the common law principle that the sale of a business (resulting in a change in the employer's legal identity) causes employment contracts to be terminated.. It was accepted by the Court in *Helping Hands* that the *Act* can operate to provide protections to employees that are not available at common law (see also *Mitchell*) and that might interfere with common law rights.

The objective of Section 97 of the *Act* is not directed at ensuring the administration of commercial arrangements, but with protecting and preserving minimum statutory standards and conditions of employment. As the Court in *Helping Hands* stated, acknowledging the decision of the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.*, (1992), 91 D.L.R. (4th) 491 (S.C.C.):

> The ESA is remedial legislation. Consistent with s. 8 of the *Interpretation Act*, R.S.B.C. 1979, c. 206 the ESA should be given such fair, large and liberal construction as best ensures its objects.

I do not perceive the original decision to be more than an application of an established interpretation and application of Section 97. It is based on a conclusion by the adjudicator of the original decision that a "disposition" had occurred and, consistent with the objectives and purposes of that provision, that the employment of the complainant should be deemed continuous and uninterrupted and rights accrued under the *Act* should be preserved.

ORDER

Pursuant to Section 116 of the *Act*, I order the original decision, BC EST #D544/00, be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal