An Application for Reconsideration

- by -

The Director of Employment Standards
(the “Director”)

- 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: Frank A. V. Falzon, Panel Chair
Fern Jeffries
John M. Orr

FILE No.: 2000/348

DATE OF DECISION: January 22, 2001

DECISION

I. OVERVIEW

On May 9, 2000, the Director applied to have this Tribunal reconsider an adjudicator's decision rendered November 9, 1999 in favour of an employer: BCEST #D466/99. This case comes from Kelowna.

The Valorosos, referred to in this decision as "the employer", are restauranteurs. They operate *Primadonna Ristorante Italiano*, an Italian restaurant. Before that, the establishment was an O'Donals Restaurant. The O'Donals corporation sold the restaurant to the Valorosos in May, 1997 by way of asset sale. Sylvia Revesz had worked for O'Donals since 1991. Terry Smith had worked there since 1994. They are "the employees" referred to in this decision. The salient facts, taken from the adjudicator's decision, are these:

> The Valorosos purchased the restaurant from O'Donals Restaurants of Canada Ltd. (O'Donals) with the sale completing on May 27, 1997.
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> By letter dated May 1, 1997 [from O'Donals] 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.
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> 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 Ltd." The letter furthermore stated that the Valorosos would interview employees for consideration of future employment….
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> 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".
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> 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.

Two months later, the Valorosos terminated the employees without cause.

The question arose as to whether the employees were entitled to termination pay and vacation pay benefits from the new employer under the *Employment Standards Act*, R.S.B.C. 1996, c. 113 ("the *Act*"). The answer, under section 63 of the *Act*, depends on their length of

service. If they only worked for the new employer for two months, they have no entitlement against the employer. However, if their previous time with O'Donals "counts", they have a significant entitlement under s. 63.

In addressing this issue, both the Director and the adjudicator focused on s. 97 of the *Act*:

> 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 Director concluded that the employees' past employment with O'Donals did count and had been inherited by the new employer. This Determination, made some two years after the complaint was filed, found the employer liable to pay the two employees compensation for length of service and annual vacation pay, amounting in total to $2,039.78.

In August 1999, the employer appealed to the Tribunal from that Determination. In her decision three months later, the adjudicator cancelled the Determination. The adjudicator found that, on the facts here, the Determination reflected a "fundamental mistake of law".

On May 9, 2000, the Director asked us to reconsider that conclusion, citing s. 116(1) of the *Act*:

> s. 116 (1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
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> (b) cancel or vary the order or decision or refer the matter back to the original panel.

The Director's submissions do not explain the six month delay in making this reconsideration application.

II. ISSUES

Should the Panel reconsider the adjudicator's decision, and if so, should the decision be set aside?

III. THE DIRECTOR'S APPLICATION

The Director has asked us to reconsider the adjudicator's decision on the following basis:

> In order to provide the community with information on the application of section 97, information that is of significance to those persons buying and selling businesses, the Tribunal should take this opportunity afforded by this reconsideration application to deal with this issue. This decision is the "best case" currently, and for the past few months, available to the Tribunal to deal with this issue. While this issue arises often, it is not often litigated. There is within the community widely different views as [to] how the principles set out in *Lari Mitchell et al* (BC EST #D107/98) when a vendor provides working written notice or pays compensation concurrent with the disposition of the business. A reconsideration of this decision may provide closure.

The Director submits, moreover, that the adjudicator's decision is inconsistent with "other Tribunal decisions that are indistinguishable on the facts". She cites one case: *First Equipment Centre Inc.* BCEST #D597/97.

IV. DECISION

Timeliness and the exercise of the reconsideration power

As reflected in decisions such as *Milan Holdings Inc.*, BCEST D#313/98 and *Re Director of Employment Standards*, BCEST D#526/00, the *Act* creates a legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute. While the section 116 discretion to reconsider is an important safeguard against serious error, there should always be good reason to entertain a reconsideration application.

There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the "winner" not be deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a Tribunal process skewed in favour of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

The principles relevant to the exercise of the reconsideration discretion were expressed as follows in *Milan Holdings Ltd., supra*:

> While the Director or a person named in a tribunal decision has the right to make application for reconsideration (s. 116(2)), the decision whether to exercise the reconsideration power is specifically left to the discretion of the Tribunal: s. 116(1). The Tribunal has sought to exercise that discretion in a principled fashion, consistent with the fundamental purposes of the *Act*. One such purpose is to "provide fair and efficient

procedures for resolving disputes over the application and interpretation of the Act": s. 2(d). Another is to "promote fair treatment of employees and employers": s. 2(b).

To realize these purposes in the context of its reconsideration power, the Tribunal has attempted to strike a balance between two extremes. On the one hand, failing to exercise the reconsideration power where important questions of fact, law, principle or fairness are at stake, would defeat the purpose of allowing such questions to be fully and correctly decided within the specialized regime created by the *Act* and Regulations for the final and conclusive resolution of employment standards disputes: *Act*, s. 110. On the other hand, to accept all applications for reconsideration, regardless of the nature of the issue or the arguments made, would undermine the integrity of the appeal process which is intended to be the primary forum for the final resolution of disputes regarding Determinations. An "automatic reconsideration" approach would be contrary to the objectives of finality and efficiency for a Tribunal designed to provide fair and efficient outcomes for large volumes of appeals. It would delay justice for parties waiting to have their disputes heard, and would likely advantage parties with the resources to "litigate": see *Re Zoltan T. Kiss* (BC EST #D122/96).

Consistent with the need for a principled and responsible approach to the reconsideration power, the Tribunal has adopted an approach 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: *Re British Columbia (Director of Employment Standards)*, BCEST #D122/98. In deciding this question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:

> (a) Where the application has not been filed in a timely fashion and there is no valid cause for the delay: *Re British Columbia (Director of Employment Standards)*, BCEST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.* BC EST #D522/97 (Reconsideration of BCEST #D007/97).
>
> (b) Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding

of fact made without a rational basis in the evidence): *Re Image House Inc.*, BCEST #D075/98 (Reconsideration of BCEST #D418/97); *Alexander (c.o.b. Pereguine Consulting)* BCEST #D095/98 (Reconsideration of BCEST #D574/97); *323573 BC Ltd. (c.o.b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BCEST #D186/97);

(c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid multiplicity of proceedings, confusion or delay": *World Project Management Inc.*, BCEST #D134/97 (Reconsideration of BCEST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.

The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. As noted in previous decisions, "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": *Khalsa Diwan Society* (BCEST #D199/96, reconsideration of BCEST #D114/96).

In considering the importance of the issues "to the parties and/or their implications for future cases", it perhaps goes without saying that the Tribunal is not applying a litmus test based on the purely subjective perspectives of the parties; every dispute is "important" to the parties involved. Yet just as the Court of Appeal will take into account "a [question of] statutory interpretation that was particularly important to a litigant" in deciding whether to grant leave to appeal from the decision of an administrative tribunal (*Queen's Plate Development Ltd. v. Vancouver Assessor, Area 9)* (1987), 16 B.C.L.R. (2d) 104 (C.A.); *Richard's on Richards Cabaret v. General Manager, Liquor Control and Licensing* [1986] B.C.J. No. 261 (C.A.)), so too questions of law of particular importance to individual circumstances parties before the Tribunal will be a factor under s. 116.

How should the question of "timeliness" enter into the exercise of the reconsideration power? To repeat the relevant passage from *Milan Holdings*:

> For example, the following factors have been held to weigh against a reconsideration:
>
> (a) Where the application has not been filed in a timely fashion and there is no valid cause for the delay: *Re British Columbia (Director of Employment Standards)*, BCEST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.* BC EST #D522/97 (Reconsideration of BCEST #D007/97).

This paragraph does not state that delay is only relevant where it is combined with prejudice to one of the parties. It plainly states that prejudice will be "considered" in the overall context of delay.

We respectfully disagree with the Director that, in exercising the s. 116 discretion, the consideration of lengthy and unexplained delay is tantamount to the unauthorized creation of rules. When the Tribunal takes delay into account, it is not seeking to impose "rules". Instead, it is recognizing that in a legislative scheme which emphasizes finality - and which to that end confers a *discretion* rather than right to reconsider - the Tribunal must be able to exercise a judgement about when, in all the circumstances (and to put it bluntly), "enough is enough". As so eloquently stated by LeBel J. (dissenting but not on this point) in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] SCC 44 at para. 140:

> Unnecessary delay in judicial and administrative proceedings has long been an enemy of a free and fair society. At some point, it is a foe that has plagued the life of almost all courts and administrative tribunals. It's a problem that must be brought under control if we are to maintain an effective system of justice, worthy of the confidence of Canadians. The tools for this task are not be found only in the *Canadian Charter of Rights and Freedoms*, but also in the principles of a flexible and evolving administrative law system.

The majority and dissent in *Blencoe* differed over the nature and application of the test for when delay might amount to an "abuse of process" sufficient to constitute a breach of natural justice. We are not concerned with abuse of process in this case.

We cite the above passage for the much more modest proposition that in deciding whether to *reopen and reverse* a "final" conclusion by an adjudicator whose decisions are protected by a privative clause, delay in applying for the reconsideration remedy must be considered in the exercise of discretion. Even without formal monetary prejudice to a third party, delay has a human cost. That cost might be referred to as the "exhaustion factor". It is a factor especially

pronounced in a case such as this involving human beings who, despite having a *bona fide* dispute over a termination from the restaurant, also value closure and the need to get on with their lives. In this case, it is noteworthy that in addition to the employer's objections regarding timeliness, one of the employees has even made comment about the need for closure:

> I believe this case has been going on for a very long time. I will be happy when it is finally settled. It has been over 3 years.

An analogy may be made to the law of judicial review where, despite the absence of a limitation period in this Province, the Courts maintain the historic prerogative to dismiss a judicial review application based on unreasonable and unexplained delay.[1] The historic discretion to dismiss based on unreasonable delay even in the absence of formal "prejudice" is clear, though prejudice will of course make the case stronger, and may be presumed in the case of some lengthy delays: *R. v. Aston University Senate*, [1969] 2 Q.B. 538 (C.A.) at 555; *Immeubles Port Louis v. Lafontaine (Village)* (1991), 78 D.L.R. (4th) 175 (S.C.C.) at p. 204; *PPG Industries Ltd. v. Canada* (1975), 65 D.L.R. (3d) 354 (S.C.C.); *Breton v. Battlefords Union Hospital Board* (1992), 6 Admin L.R. (2d) 11 (Sask. Q.B.). As summarized in *Friends of the Oldman River Society v. Canada* (1992), 88 D.L.R. (4th) 1 (S.C.C.) at p. 50:

> There is no question that unreasonable delay may bar an applicant from obtaining a discretionary remedy, particularly where that delay would result in prejudice to other parties who have relied on the challenged decision to their detriment, and the question of unreasonableness will turn on the facts of each case.

A classic formulation is that of Lord Denning in *R. v. Herrod*, [1976] 1 Q.B. 540 (C.A.) where the rationale was directly related to the need for finality in decision-making:

> If a person comes to the High Court seeking certiorari to quash the decision of the Crown Court - or any other inferior tribunal for that matter - he should act promptly and before the other party has taken any

[1] Suggestions appear from time to time that s. 11 of the *Judicial Review Procedure Act* modifies the Court's inherent discretion to dismiss for unreasonable and unexplained delay, unless there is "substantial prejudice" to someone. This is wrong, being contrary to both the procedural nature of the *JPRA* which was designed solely to simplify procedure rather than change the substantive law of judicial review [see *JRPA*, ss. 2(2), 4, 8(1), *Culhane v. A.G.B.C.* (1980), 108 D.L.R. (3d) 648 (B.C.C.A.) per Lambert J.A. (dissenting but not on this point) at 662-63; *WCB v. BC Council of Human Rights* (1988), 23 B.C.L.R. (2d) 72 (S.C.) at 80] and contrary to the plain words of s. 11 which says merely that delay alone is not a bar to *application* – leaving the Court's discretion to refuse a *remedy* entirely intact: *JPRA*, s. 8. The law of judicial review makes clear that there is major difference between a "limitation period" at the front end of litigation, and the discretion to refuse a remedy at the back end: *Harelkin v. University of Regina*, [1979] 3 W.W.R. 676 (S.C.C.) at 685 and *Homex Realty v. Village of Wyoming*, [1980] 2 S.C.R. 1011 at 1035.

> step on the faith of the decision. Else he may find that the High Court will refuse him a remedy. *If he has been guilty of any delay at all, it is for him to get over it and not the other side.* [emphasis added]

As noted by Jones and de Villars, *Administrative Law* (1999, 3d ed) at pp. 583-84, the Court retains the discretion to dismiss for undue delay even where there is a limitation clause:

> Rule 743.06 of the Alberta Rules of Court provides that an application for judicial review to quash or overturn a decision shall be filed and served within six months after the order to which it relates, and further expressly provides that the court cannot enlarge or abridge this time limitation.
>
> It does not necessarily follow, however, that an application can safely wait for six months without running the risk of the court finding there to have been an unreasonable delay. What constitutes unreasonable delay is a question to be decided in each case. *One primary consideration must be the need for effective and reliable administration, which must entail the notion of finality in decision-making.* [emphasis added]

We do not cite these authorities to suggest that the Tribunal has an equitable jurisdiction. We are well aware that our jurisdiction is purely statutory. We cite them to illustrate that in any system of justice where finality is a central value, delay must be considered where discretion is granted to consider applications by a person to further extend litigation. In our view, it would be an error of law not to consider it.

Having noted that finality is a central value, we hasten to emphasize that it is not the only value under the *Act*. We should therefore be cautious not to unduly isolate the factor of delay or create a *de facto* limitation period that was not enacted by the Legislature.

In our view, the reasons in favour of reconsideration should always be considered, even in cases of egregious and unexplained delay: *Milan Holdings Ltd;* and see *MacLean v. University of British Columbia* (1993), 109 D.L.R. (4th) 569 (B.C.C.A.); and see *Re British Columbia (Director of Employment Standards)* BCEST #D426/2000. To the extent that previous decisions of this Tribunal suggest otherwise, we prefer the present approach. Unless and until a limitation period is enacted, the Tribunal ought to remain open in principle to reconsidering decisions where, even in the case of a lengthy and unexplained delay such as we have here, the other circumstances cry out for reconsideration. Indeed, there may even be cases such as this one where, despite unreasonable delay and a correct adjudicator's decision, comment by a reconsideration panel is warranted.

We find it useful to summarize the principles we have set out above:

1. The Tribunal will properly consider delay in deciding whether to exercise the reconsideration discretion;

2. Where delay is significant, an applicant should offer an explanation for the delay. A delay which is not explained will militate against reconsideration.

3. Delay combined with demonstrated prejudice to a party will weigh even stronger against reconsideration. In some cases, the Tribunal may presume prejudice based on a lengthy unexplained delay alone.

4. Even in cases of unreasonable delay, the Tribunal ought to consider the merits, and retains the discretion to entertain and grant a reconsideration remedy where a clear and compelling case on the merits is made out.

Having devoted significant energy to elucidating the principles governing the Tribunal's discretion under s. 116, we hasten to add that one cannot dictate the outcome of its exercise in advance. A great strength of our legal system – one that is at once frustrating for students of law and compellingly true for those administering it – is that "it all depends on the circumstances". We now turn to the circumstances here.

Application to the facts of this case

This is an untimely application. In the context of a dispute with straightforward facts, and which only took the Tribunal three months to decide from the time the notice of appeal was filed, it was not timely for the Director to wait six months before filing a s. 116 application. This is particularly so where the application came from the Director rather than the parties most directly affected by the decision. At no point in the submissions process was the delay explained. In all the circumstances, we consider that delay to have been prejudicial to both the employer and employees, all of whom are entitled to fair treatment under the *Act* (s. 2(a)) and all of whose submissions reflect a wish to conclude this dispute and put the matter behind them. Nor can we ignore the fact that this delay comes in the context of a two year delay in making the Determination in the first place. In that context, the prejudicial effects of an untimely reconsideration application are magnified.

The Director submits that we should reconsider the adjudicator's decision because our decision may provide "closure" on "confusion" within "the community" regarding the *Lari Mitchell* decision "when a vendor provides working notice or pays compensation for length of service concurrent with the disposition of a business". It says the adjudicator's decision was inconsistent with the *First Equipment Centre* decision.

We have considered whether, despite the untimeliness and limited argument regarding section 97, the adjudicator's decision gave rise to fundamental error or injustice to the parties that cries out for correction. We would answer "no". We uphold the adjudicator's decision.

In the circumstances before us, we consider that brief comment on why the adjudicator's conclusions were correct is appropriate. For convenient reference, we repeat s. 97:

> 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.

It is the Tribunal's role to read the words of s. 97 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 the Legislature. After applying those tools, remaining genuine ambiguities are to be resolved in favour of the claimant: *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27. The adjudicator's decision reflects fidelity to that direction.

The adjudicator found as a fact that the date of disposition of the business was May 27, 1997. This was the date of the "the change in the legal identity of the owner" (*Lari Mitchell*, paras. 42-43) and thus the key juridical date. The previous employer had terminated the employees effective May 21, 1997, a full 6 days before the disposition. As of May 21, 1997, they had ceased to be "employees of the business".

In short, the disposition had not yet occurred, and they were unemployed, albeit with the rights against the vendor given them under s. 63.

The wrinkle this case presented is this: the employees - having been terminated and therefore unemployed as of May 21, 1997 – were interviewed and hired by the Valorosos for their business on May 24, 1997, three days before the disposition. Three months later they were fired without cause. Is the fact that the employees were employed by the new business at the date of disposition sufficient to trigger section 97 and require that the employment be deemed "continuous and uninterrupted" by the disposition?

The adjudicator answered "no". We find this answer supported by the language and policy of the section and the *Act* in general.

On its plain language, section 97 is framed to protect the employee of the business that is disposed of at the time the business is disposed of. As concisely stated by Vickers J. in *Mitchell v. British Columbia (Director of Employment Standards)* [1998] B.C.J. No. 3005 (S.C.) at para. 41:

> I conclude that s. 97 must be interpreted to mean that if employees are employed by a <u>vendor</u> at time a business is disposed of then for the purpose of the Act, the employment of those employees is deemed to be continuous with the successor employer. In short, nothing has changed and all the benefits of these employees are continued with the new

> employer. Their employment is continuous and it cannot be said to have been terminated. [emphasis added]

In our view, Justice Vickers' statement is consistent with the plain meaning and structure of the *Act*, the rationale behind section 97, and common sense.

The action taken by O'Donals – termination - is a step specifically contemplated by the *Act*. The former employer exercised the discretion to terminate. However, because the termination was without cause, the employer had statutory obligations. It had to "pay" by way of notice and/or compensation (s. 63).

The planned sale of business assets such as existed in early May, 1997 does not under s. 97 of the *Act* give employees a special "right" not to be terminated in advance of a disposition. If they are terminated, they have the full panoply of rights under s. 63. The *Act* does not create an exception to the scheme in s. 63 where termination happens in the context of the planned sale of a business.

As a matter of law, it could not be said that O'Donals did not have the right to terminate the employees prior to the disposition. Nor could it be argued that, having so terminated them (without cause), O'Donals had no liability under s. 63.

This is important as a matter of policy because if, in addition to the employees' rights under s. 63, the new employer inherited their past service in the mere act of hiring (post-termination) for the new business, the employees would be entitled to "double compensation". In our view, such a result overshoots the purpose of section 97. Section 97, and the *Act* in general, are designed to ensure that employees retain their minimum employment standards, not to confer a double benefit.

Indeed, properly understood, section 97 does not so much confer a new benefit as *shift* the responsibility for paying it. Double compensation offends its purpose. Either one employer or the other must pay.

In a situation such as this, where the termination happens before the disposition, it makes sense that the employer who actually fired the employee pay up. This result is just, because they had the employment relationship. It is fair because it allows the employer to decide on what combination of notice and pay to provide where the termination is without cause. And it provides certainty for employees who – if they could only pursue the "new" employer - might be subject to all sorts of bizarre "hiatus periods" and delays in asserting s. 63 rights against any employer if there were significant delays in the actual disposition and/or potential hiring with the prospective purchaser/employer.

As Justice Vickers notes, section 97 addresses, both in language and intent, nothing more or less than the situation of employees of the vendor at the time the business is disposed of. A perfect example is *Helping Hands Agency Ltd. v. British Columbia (Director of Employment*

Standards), [1995] B.C.J. No. 2524 (C.A.). In that case, Caring Hearts Health Care Services operated home care services for the elderly. Helping Hands bought business assets from Caring Hearts. As is clear from the facts of that case, the employees of the former business were all continued with the new company:

> On January 7, 1992, Helping Hands wrote to the employees of Caring Hearts informing them that the vendor company "joined forces with Helping Hands" and extended a warm welcome to the Caring Hearts clients and staff.

In those circumstances, the Court of Appeal rightly held that the employment was deemed to be continuous and that new company inherited the statutory liabilities (in that case, vacation pay) of the old. In "deeming the employment to be continuous and uninterrupted by the disposition", section 97 altered the position at common law, where the purchaser was not required to give credit for length of service with the vendor (for a Tribunal decision with similar facts, see *Re Willie Dodge Chrysler* BCEST #D387/97).

The Director suggests that the adjudicator's decision is inconsistent with *First Equipment Centre*, BCEST #D597/97, upheld on reconsideration BCEST #D282/98. We disagree. In that case, the reconsideration panel expressly stated that: "What is obvious from the facts is that [the employee] was never terminated by Case Corporation prior to the disposition" (para. 3). A similar finding was made in *Re Piney Creek Logging Ltd.*, BCEST #D546/98, at para. 16, where the adjudicator held that "There is no evidentiary basis for arguing that [the employee] was, for the purposes of the Act, terminated by Twin Star prior to the disposition of its business and assets to Piney Creek". In this case, we have an express finding of fact by the adjudicator, accepted by the Director in his application, that the employees were terminated by O'Donals prior to the disposition.

A Tribunal decision that *does* present facts similar to those here is *Re 550635 BC Ltd. (cob Jack's Towing),* BCEST #D272/99. In that case, the former employer terminated the employees prior to the disposition. Both were given adequate severance pay before the disposition. They were then hired by the new employer. Citing the original three person Panel decision in *Mitchell,* the adjudicator in that case stated as follows at para. 10:

> In this case the employees were terminated prior to the sale. They were give notice under the Act and they do not have a claim against the new employer. In my view, the delegate erred in law when he found that the termination of the employment relationship … was unaffected by the termination by their previous employer.

Other decisions of the Tribunal reflect the approach of Justice Vickers in *Mitchell.* For example, in *Re Lerner (c.o.b St. Louis Grill),* BCEST #D299/00 in the Tribunal quoted from the Tribunal's decision in *Mitchell:*

> In our view, the plain meaning of section 97 is that where there is disposition of a business, section 97 deems employment to be continuous and uninterrupted for the purposes of the Act. If an employee is not terminated by the vendor employer prior to or at the time of the disposition, then for the purposes of the Act, the employment of the employer is deemed to be continuous….
>
> The deeming of employment to be continuous and uninterrupted is triggered by the fact of disposition, not by the decision of an employee to continue employment with the purchaser employer. [p. 22, emphasis ours]
>
> 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 (p. 6).

The matter was put succinctly in *Re Teamwork Property Solution's Ltd.* BCEST #D434/98 at para. 16: "The operation of Section 97 is contingent upon two findings of fact: one, that there is a disposition of a business or substantial part of the assets of the business; and, two, that there is employment with the "vendor" employer as of the date of the disposition".

In our view, the adjudicator's decision reflects no error, let alone serious error. It is consistent with previous decisions of this Tribunal. It accords ideally with the language of section 97, the structure of the *Act* in relation to s. 63, and the objects of both those sections in light of the overall purpose of the *Act*.

The adjudicator correctly held that the relevant employer for purposes of these factors was the vendor. In the case of Smith, the employer gave the required notice (3 weeks). In the case of Revesz, the notice was insufficient. Her remaining rights are protected under section 63 and must be asserted against the asset vendor.

V. ORDER

The reconsideration application is dismissed.

FRANK A.V. FALZON

Frank A. V. Falzon
Adjudicator, Panel Chair
Employment Standards Tribunal

FERN JEFFRIES

Fern Jeffries
Chair
Employment Standards Tribunal

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