EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to section 116 of the *Employment Standards Act* R.S.B.C. 1996, c. 113

- by -

Lari Mitchell and others
(the "excluded employees")

and

B.C. Government and Service Employees' Union
(the "BCGEU")

and

The Director of Employment Standards
(the "Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

RECONSIDERATION PANEL: Geoffrey Crampton
David Stevenson
Sherry Mackoff

FILE N0.: 96/779

DATE OF DECISION: March 4, 1998

DECISION

COUNSEL FOR THE PARTIES

Mr. George C. E. Fuller	for Lari Mitchell and others
Mr. Ken Curry	for the B.C. Government and Service Employees' Union
Ms. Susan P. Arnold	for the British Columbia Systems Corporation
Mr. Peter A. Gall	for the Public Service Employee Relations Comission
Ms. Catherine Hunt	for the Director of Employment Standards

OVERVIEW

This is an application by Lari Mitchell and others (the "excluded employees") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of a decision of the Employment Standards Tribunal, B.C. EST No. D314/97, dated July 25, 1997 (the "Original Decision"). The excluded employees are former employees of British Columbia Systems Corporation ("B.C. Systems") who were not part of the bargaining unit represented by the B.C. Government and Service Employees' Union (the "BCGEU").

Both the BCGEU, which represents former bargaining unit employees of B.C. Systems, and the Director of Employment Standards (the "Director") support the reconsideration application brought by the excluded employees.

The application for reconsideration is opposed by B.C. Systems and the Public Service Employee Relations Commission ("PSERC") which represents Her Majesty in Right of the Province of British Columbia (the "provincial government" or the "Government"). Both B.C. Systems and the Government submit that the reconsideration application should be dismissed.

There are two issues before us on this reconsideration application.

First, did the Tribunal (hereinafter referred to as the "original panel") correctly interpret section 97 of the *Act*. Section 97 reads:

> *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.*

Secondly, did the original panel err in deciding that the word "employer" in section 65(1)(f) of the *Act* includes an "associated corporation" (as described by section 95), when the hearing was convened to decide whether the delegate's interpretation of section 97 was correct. Section 65(1)(f) of the *Act* exempts an employer from liability for length of service

under section 63 and liability for group termination under section 64 where an employee "*has been offered and has refused reasonable alternative employment by the employer.*"

The excluded employees, with the support of the BCGEU and the Director, submit that the original panel's interpretation of section 97 is incorrect in law. They also submit that the original panel erred by confirming the delegate's decision that the word "employer" in section 65(1)(f) could include an "associated corporation" as described by section 95.

The context in which these issues arose can be described as follows. Eighty-four termination complaints were filed with the Employment Standards Branch by former employees of B.C. Systems. These complaints were investigated by a delegate of the Director.

In Determination No. CDET 004908 the delegate decided that neither B.C. Systems nor the Government had contravened either the individual termination provisions of the *Act* set out in section 63 or the group termination provisions of the *Act* set out in section 64. The delegate concluded that because less than 50 employees were terminated at a single location within any two month period, the group termination provisions, contained in section 64, had not been contravened. He also decided that the individual claims for compensation for length of service should be dismissed because the requirements for individual termination set out in the *Act* had been met.

Although the primary issue in the Determination was whether B.C. Systems had contravened the group termination provisions of the *Act*, the delegate, in order to reach a decision on that issue, considered and decided a number of subsidiary issues. One of the subsidiary issues which the delegate addressed was the interpretation of section 97. Another subsidiary issue concerned the meaning of the word "employer" in section 65(1)(f).

The excluded employees, the BCGEU, B.C. Systems and PSERC all filed appeals from the delegate's Determination. These appeals raised a number of issues. However, with the consent of all of the parties, the original panel held a hearing to address an issue raised by B.C. Systems and PSERC. That issue was whether the delegate's interpretation of section 97 was correct.

FACTS

We adopt the following facts that are set out at page 3 of the Original Decision:

> By way of brief background, the present appeal proceedings arise out of a restructuring of B.C. Systems that was first announced by the provincial government in the fall of 1995. In essence, a number of B.C. Systems employees were transferred from that crown corporation to the B.C. government payroll while a number of other employees either resigned after
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> having been given financial incentives to do so, took early retirement, or were terminated with severance pay.
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> Some employees involved in the present appeals were members of a bargaining unit for which the B.C. Government and Service Employees' Union ("BCGEU") was the certified bargaining agent. This group of employees has been referred to in the Determination and during the first phase of the appeal hearing as the "included employees". Another discrete group of appellant employees -- 33 in total -- were not included in the BCGEU bargaining unit; these employees ("Lari Mitchell and others") have been referred to as the "excluded employees".
>
> According to the Reason Schedule appended to the Determination (and so far as we are aware these facts are not in dispute), during the period December 1995 to March 1996, 1,011 employees of B.C. Systems were transferred from B.C. Systems' to the provincial government's payroll. These employees were offered, and accepted, essentially identical positions with the government. However, some 58 former B.C. Systems employees refused to accept a transfer to the provincial government -- these employees comprise two distinct groups.
>
> The first group, 21 in number, gave advance notice of their intended refusal to accept any transfer and instead opted to resign with severance pay as set out in the BCGEU collective agreement; these employees resigned pursuant to a program known as the "Advance Notice of Intention to Refuse Transfer to Government" program. The second group, 37 in number, only refused the transfer when an actual position was offered to them (i.e., there was no advance "opting out" of the proposed transfer).

It is in the context of the 58 employees who refused transfer of employment to the provincial government that the section 97 issue arises.

This reconsideration has proceeded by way of written submissions.

THE DETERMINATION

Section 97

The key issue before the delegate, with respect to these 58 employees, was whether they were "terminated employees for the purpose of group termination." At page 10 of his Determination the delegate put the issue this way:

> At issue with respect to these 58 employees, is whether they are "terminated" employees for the purpose of group termination. To answer
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> this question, several other sub-issues must be evaluated.
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> By refusing to transfer to similar positions with government, did these employees effectively quit, or did they have the right under the Act to refuse a transfer and be treated as a terminated employee?

The delegate considered section 97 of the *Act*. He noted that because of the decision in *B.C.G.E.U. v. Industrial Relations Council et al.* (1988), 33 B.C.L.R. (2d) 1 (B.C.C.A.) (hereinafter "*Verrin*") employees who choose not to accept employment with a purchaser may be treated as terminated employees.

The delegate concluded that section 97 did not operate to deny group termination pay to the 58 employees who chose not to accept employment with the Government and that those employees who refused to transfer to Government could be treated as terminated employees.

Section 65(1)(f)

The delegate then went on to consider section 65(1)(f) of the *Act*. Section 65(1)(f) exempts an employer from liability for length of service under section 63 and liability for group termination under section 64 where an employee "*has been offered and has refused reasonable alternative employment by the employer*." Section 65(1)(f) reads:

> 65(1) *Sections 63 and 64 do not apply to an employee*
>
> > *(f) who has been offered and has refused reasonable alternative employment by the employer*.

It was the delegate's conclusion that section 65(1)(f) operated as a defence to a claim for termination pay only if the offer of "reasonable alternative employment" was made by **the employer** (namely, B.C. Systems) or an employer that was determined to be an "associated corporation" by virtue of section 95 of the *Act*. Thus, employees who refuse "reasonable alternative employment" from an "associated corporation" would not be entitled to termination pay.

The delegate then addressed whether B.C. Systems and the Government were "associated corporations" under section 95 of the *Act* and should, therefore, be considered to be one employer. He came to the conclusion that B.C. Systems and the Government were "associated corporations" for the purposes of the *Act*.

In light of this finding, that B.C. Systems and the Government were "associated corporations" (one employer for the purposes of the *Act*), the delegate found that the 58 employees who refused transfer to the Government "cannot be considered terminated for the purpose of group termination" (at page 18 of the Determination).

THE ORIGINAL PANEL'S DECISION

Section 97

At the hearing before the original panel the issue was whether the delegate's interpretation of section 97 was correct.

The original panel's key conclusions on the interpretation of section 97 are stated at pages 6, 7 and 8 of the decision:

> ... under the *Act*, employees are presumptively treated the same whether or not the business is sold via a sale of shares or assets -- in either case the sale, *per se*, does not terminate the underlying employment relationships. Section 97 is triggered so 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 merely continues with the asset purchaser being, in effect, substituted for the asset vendor as the employer of record. ... (at page 6)
>
> Of course, the employees of the asset vendor, assuming they have not otherwise quit or been terminated, are not obliged to continue to be employed by the asset purchaser. However, if they refuse to continue on with the asset purchaser, then they have, in effect, voluntarily quit and are not entitled to claim termination pay [see section 63(3)(c) of the *Act*] nor would they be eligible for group termination pay under section 64. If the employees of the asset vendor have not resigned or been terminated prior

> to the completion of the sale, their employment continues on and, therefore, if the asset purchaser wishes to terminate their employment, or refuses to allow such employees to continue to be employed by the asset purchaser, the asset purchaser will be liable for termination pay under sections 63 and, if applicable, section 64 of the *Act* subject to any applicable statutory defences. ...
>
> 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. (at page 7)
>
> Situations may also arise where an employee, or group of employees, continues to be employed by the asset purchaser but under substantially less beneficial terms and conditions which were unilaterally imposed by the new
>
> employer. In such circumstances, there may be a constructive dismissal in which case the new employer would be liable for termination pay (subject to any applicable statutory defences) by reason of section 66 of the *Act*. (at page 8)

In short, the original panel concluded that the delegate's interpretation of section 97 was incorrect.

Section 65(1)(f)

With respect to section 65(1)(f) of the *Act*, the original panel agreed with the delegate's conclusion: section 65(1)(f) can only be raised as a defence to a claim for termination pay where the offer of "reasonable alternative employment" is made by the current employer or by an employer designated as an "associated corporation" pursuant to section 95. We quote from the Original Decision to show the context in which the original panel came to these conclusions:

> There may be cases where the asset vendor purports to terminate the employees prior to the asset sale but refuses to pay compensation for length of service, or to give proper written notice, because the employee has refused a new offer of employment with the asset purchaser. In our view, and in those circumstances, the vendor employer would not be able to

> avoid liability by reason of section 65(1)(f) of the *Act*, because the offer of employment would have been made by a third party. **We agree with the Director that section 65(1)(f) of the *Act* is intended to create a defence only in circumstances where the *current employer* has made an offer of reasonable alternative employment which was not accepted by the employee. On the other hand, if the "third party employer" could be characterized as one and the same as the current employer (say, by reason of a section 95 designation), the section 65(1)(f) defence would govern.** (emphasis added; at pages 7 to 8)

ISSUES ON RECONSIDERATION

As stated at the outset of these reasons, the excluded employees, with the support of the BCGEU and the Director, appeal the original panel's decision. In the overview to this decision we set out the two issues that are before us. We repeat them here.

First, the excluded employees submit that the original panel's interpretation of section 97 is incorrect in law. Secondly, they submit that the original panel erred by confirming the delegate's decision that the word "employer" in section 65(1)(f) could include an "associated employer" as described by section 95.

We note here that we consider this to be an appropriate case for reconsideration. It involves

an important question of law under the *Act* and it meets the criteria for reconsideration set out in the recent decision of the Tribunal in *The Director of Employment Standards*, BC EST #D479/97. Neither B.C. Systems nor PSERC has taken the position that this is an inappropriate case for reconsideration.

We propose to deal with the "section 65(1)(f)/section 95" issue first.

ISSUE #1

Did the original panel err in confirming the delegate's decision that the word "employer" in section 65(1)(f) includes an "associated corporation", as designated by section 95, when the hearing before the original panel was, by agreement, convened to decide whether the delegate's interpretation of section 97 was correct?

Arguments

Counsel for the excluded employees submits that the original panel made an error "amounting to a breach of the principles of procedural fairness and natural justice" by deciding that the word "employer" in section 65(1)(f) of the *Act* includes an "associated employer". This position is supported by counsel for the BCGEU.

In his application for reconsideration, counsel for the excluded employees put the matter this way:

> Lastly, we submit that the Tribunal committed an error in its Decision regarding sections 95 and 65(1)(f) of the Act. When the hearing was constituted, the Tribunal, by agreement with the parties, determined that the scope of the hearing would be strictly confined to the interpretation of section 97, and in the context of section 97, the related application of section 65(1)(f) of the Act. During the hearing, the parties restricted their submissions to the interpretation and meaning of section 97. We submit that as the parties did not make submissions on the meaning of section 95 at the hearing, the Tribunal is in error in confirming in its order the Director's Determination on the applicability of section 65(1)(f) as a defence where an offer of employment is made by a current employer or "associated employer" under section 95. (at page 8)

Counsel for the Director in her written submission on this application for reconsideration states the following on this issue:

> The Director also supports the excluded employees' position that the Tribunal committed an error in confirming the Director's position on s. 65(1)(f) of the *Employment Standards Act*. The Director understood the
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> scope of the hearing to be limited to the interpretation of s. 97 by agreement of the parties.

Analysis

The purpose of the hearing before the original panel was to determine whether the delegate had correctly interpreted section 97 of the *Act*. With the consent of the parties, the original panel had ordered that that issue be set down for a separate hearing:

> ... At the conclusion of the pre-hearing conference, and with consent of the parties, the Tribunal ordered that an issue raised by the appellants B.C. Systems and the Province of British Columbia ... should be set down for a

> separate hearing. This particular issue is whether or not the Director's interpretation of section 97 of the *Act* ... was correct. (at page 2)

It is significant that counsel for the Director, whom we assume supports the delegate's **entire** Determination (including his decision that the word "employer" in section 65(1)(f) includes an "associated corporation") supports the position of counsel for the excluded employees that the scope of the Original Decision should have been limited to the interpretation of section 97 of the *Act*.

It is also significant that counsel for PSERC, in his reply to the application for reconsideration (which was supported by counsel for B.C. Systems), did **not** address this ground for reconsideration.

Whether the word "employer" in section 65(1)(f) includes an "associated corporation", as designated by section 95, was an important issue arising from the Determination. Counsel for the excluded employees specifically appealed the delegate's conclusion that the word "employer" in section 65(1)(f) includes an "associated corporation" pursuant to section 95. It was one of several section 95 issues arising from the Determination that counsel for the excluded employees raised in his section 112 appeal. Both the excluded employees and the BCGEU have appealed the delegate's conclusion that B.C. Systems and the Government are "associated corporations" under section 95 of the *Act*.

After considering all of the submissions, we agree with counsel for the excluded employees that the original panel should not have confirmed the delegate's conclusion that the word "employer" in section 65(1)(f) includes an "associated corporation". Accordingly, that portion of the Original Decision is cancelled. The issue which the original panel ordered to be addressed, with the agreement of the parties, did not concern the application of section 95 to section 65(1)(f). The section 95 issues arising from the Determination and the section 97 issue were separate matters.

It must be pointed out that we express no opinion on whether or not we agree with the original panel's conclusion that the word "employer" in section 65(1) includes an "associated employer", as described in section 95. Our conclusion is simply that the

original panel should not have decided that issue. Given the parties' agreement to confine the scope of the oral hearing, the original panel erred in deciding an issue directly related to the interpretation of section 95. Before a decision was made on the "section 65(1)(f)/section 95" issue the parties should have been made clearly aware that that was an issue that was going to be decided as a result of the "section 97" hearing.

ISSUE #2

Did the original panel err in its interpretation of Section 97 of the Act?

For ease of reference we again set out section 97 of the *Act*. It reads:

> *Sale of business or assets*
>
> *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.*

Before setting out the arguments of the parties, we wish to comment on one particular aspect of the Original Decision.

Throughout its decision, the original panel addressed the interpretation of section 97 in terms of a "sale of business" by way of an "asset sale". The Original Decision makes the point that where a business is sold via assets, the legal identity of the employer changes, but where the sale of a business occurs by way of share transfer the identity of the employer does not change. At page 5 the original panel states:

> ... the employment issues that are addressed by section 97 are moot in the case of a "sale of business" by way of a share transfer. In the latter case, the employment contract remains undisturbed by the sale -- the employees continue to be employed by the same employer albeit under circumstances where the control of their employer has been transferred from the share vendor to the share purchaser.

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).

In the instant case there was a disposition of the business of B.C. Systems to the Government. No one has argued otherwise.

Arguments

Counsel for the excluded employees, counsel for the BCGEU and counsel for the Director submit that the original panel's interpretation of section 97 is incorrect. Their main arguments, briefly stated, are as follows:

1) The original panel erred in the way it applied the *Verrin* decision to section 97 of the *Act*.

2) The original panel's analysis failed to recognize that the *Act* is remedial legislation and that its main objective is to protect the interests of employees. Because section 97 is located in the "Enforcement" part of the *Act* it should be interpreted as a mechanism for enforcing
employee rights; not for the purpose of enabling employers to escape their obligations for individual and group termination.

3) The Original Decision failed to give effect to the statutory purposes set out in subsections 2(a) and (b) of the *Act* to ensure that employees "*receive at least basic standards of compensation and conditions of employment*" and "*to promote the fair treatment of employees ...*".

4) The Original Decision gives less protection to employees on the sale of a business than would be provided at common law.

5) The Original Decision failed to adopt the approach to section 97 that was articulated by the B.C. Court of Appeal in *Helping Hands Agency Ltd. v. Director of Employment Standards* (1995), 15 B.C.L.R. (3d) 27 (B.C.C.A.) (hereinafter *"Helping Hands"*).

Counsel for the excluded employees, in his reply submission, also argues that section 64(6) of the *Act* must be considered. Section 64(6) provides that the group termination provisions contained in section 64 apply "*whether the employment is terminated by the employer or by operation of law*." At page 7 of his reply submission, counsel for the excluded employees states:

> ... Hence, in our submission, section 64 applies to all employment terminations, including those at common law. Thus, we submit that section 97 does not apply to section 64 of the Act, since to hold otherwise would effectively nullify the meaning of section 64(6), and

> such an interpretation could not have been intended by the drafters of the Act.

Counsel for both PSERC and B.C. Systems submit that the original panel did not err in its interpretation of section 97 and that the reconsideration application should be dismissed. In essence, their arguments are as follows:

1) The Court of Appeal's interpretation of the successorship provision in the *Industrial Relations Act*, R.S.B.C. 1979, c. 212, in the *Verrin* case, does not govern the interpretation of section 97 of the *Act*.

2) Where there has been a "sale" of a business, section 97 deems employment to be "continuous and uninterrupted" for all of the purposes of the *Act*. To quote from page 3 of their submission: "If the employee continues to have the same job in the business after the sale, then the employee cannot refuse to continue in that job and claim severance pay."

Analysis

The purposes of section 97

We begin our analysis of section 97 by stating that the *Employment Standards Act* is remedial legislation that should, in accordance with section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 be given "*such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.*" (See: *Helping Hands* at pages 32 and 36.)

Although the *Act* has a variety of purposes, which are set out in section 2, the main objectives of the *Act* are to provide minimum standards of employment for the protection of employees and to provide mechanisms for enforcing those minimum standards. In *Machtinger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 (S.C.C.) Mr. Justice Iacobucci, writing for the majority, in interpreting the Ontario *Employment Standards Act* said this:

> "The objective of the Act is to protect the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination." (at page 507)

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*. For example, in the *Helping Hands* case the purchaser of the business was held liable for accrued vacation pay that the vendor owed to the employees employed by the purchaser. 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.

Section 97 gives protection to employees that they do not have at common law. In British Columbia, at common law, continuing employees are given credit for past service to the vendor employer unless the purchaser employer expressly advises them to the contrary. [See: *Sorel v. Tomenson Saunders Whitehead Ltd.* (1987), 15 B.C.L.R. (2d) 38 (B.C.C.A.)] Thus, a purchaser is not **required** to give employees credit for their length of service with the vendor.

However, under the *Act* a purchaser is statutorily required to credit a continuing employee with past service. As well, a purchaser is required to assume all of the vendor's liabilities and obligations towards the employees. Section 97 obliges the purchaser to "step into the vendor's shoes".

We note that the Minister of Labour commented on section 97 as follows:

> The act [sic] is unchanged. It simply provides that where a business or a part of it is sold and the employees of that business are retained by the new employer, for their purposes, their years of service and vacation entitlements are maintained.

Debates of the Legislative Assembly, Hansard, 4th Session, 35th Parliament, Province of British Columbia, June 20, 1995, Vol. 21, No. 9, at p. 15842.

We note, as did the original panel, that the "predecessor provisions to section 97 were narrow in scope". For example, section 7 in the *Employment Standards Act*, R.S.B.C. 1979, c. 107 was as follows:

> *Sale or transfer of business*
>
> *For the purpose of computing the annual holiday or pay in lieu thereof to which an employee is entitled where a business or part of it is sold, leased or transferred, the employment of the employee shall be deemed to be continuous and uninterrupted by the sale, lease or transfer.*

Section 97 of the *Act* (like its very similar predecessor, section 96 in the *Employment Standards Act*, S.B.C. 1980, c. 10 as amended) expands the rights of an employee. It preserves all of an employee's employment rights, not just credit for vacation entitlement.

Before leaving this discussion about the purposes of section 97, we note that it is now

placed in Part 11 of the *Act*. Part 11 is titled "Enforcement" and it embraces sections 87 through 101 inclusive. Several of those sections provide ways to enforce an employee's claim for unpaid wages. For example, section 87 is titled "Lien for unpaid wages", section
92 gives the Director the power to seize assets and section 96 sets out a director's or officer's liability for unpaid wages. Our view about the purposes of section 97 is supported by the fact that section 97 is now located in the "Enforcement" section of the *Act*.

With the main objectives of the *Act* and the purposes of section 97 clearly in mind, we now turn to the main issue before us: **did the original panel err in interpreting section 97 of the *Act*?**

The real crux of the original panel's interpretation of section 97 is stated at page 6 of the decision and we repeat it here:

> ... under the *Act*, employees are presumptively treated the same whether or not the business is sold via a sale of shares or assets -- in either case the sale, *per se*, does not terminate the underlying employment relationships. **Section 97 is triggered so 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 merely continues with the asset purchaser being, in effect, substituted for the asset vendor as the employer of record**. ... (emphasis added)

Two approaches to section 97 and our conclusion

On this appeal we have been presented with two different approaches to section 97.

It is the position of counsel for the excluded employees, counsel for the BCGEU and counsel for the Director that section 97 operates to deem employment continuous only when the purchaser actually employs the vendor's employees. If the vendor's employees do not, in fact, go to work for the purchaser, then section 97 has absolutely no application. What their position boils down to is this: A disposition of a business operates as a termination of employment under the *Act* unless the vendor's employees choose to go

to work for the purchaser. If the vendor's employees choose not to work for the purchaser then they are entitled to look to the vendor for compensation for length of service and, if applicable, group termination pay.

On the other hand, it is the position of counsel for PSERC and B.C. Systems that if employees are employed by the vendor at the time of the "sale", then for all the purposes of the *Act*, the employment of those employees is deemed to be continuous with the purchaser. This is the view expressed in the Original Decision.

It is our conclusion that the original panel's interpretation of section 97 is correct, except in one respect. It is important to state that we disagree with the following sentence at page 7 of the Original Decision:

> However, if [the employees of the vendor] refuse to continue on with the asset purchaser, then they have, in effect, voluntarily quit and are not entitled
> to claim termination pay [see section 63(3)(c) of the *Act*] nor would they be eligible for group termination pay under section 64.

In our view, before an employee forfeits "termination" rights under the *Act*, the terms of the continued employment must be scrutinized. If the terms contain a "substantial alteration to a condition of employment" then an employee refusing to continue employment with the purchaser is entitled to claim that employment has been terminated (see: section 66 of the *Act*). In that situation, an employee who refuses to continue employment would be entitled to claim compensation for length of service and group termination pay (if applicable) from the purchaser, subject to any statutory exemptions. See also our comments on section 64(6) at pages 19 and 20 below.

The Helping Hands decision

It is the position of those parties that seek reconsideration of the Original Decision that the original panel erred because it did not adopt the approach to section 97 that was followed by the B.C. Court of Appeal in *Helping Hands*. They submit that before section 97 is triggered there must first be a sale of a business and secondly, the purchaser must have employed an employee of the vendor employer. As noted by counsel for the excluded employees, *Helping Hands* has been followed by various panels of this Tribunal.

In *Helping Hands* the vendor employer operated a business which provided home care services for the elderly. It sold assets used in connection with its business to a purchaser that operated a similar business. A number of the vendor's employees went to work for the purchaser. The issue which the Court addressed was whether the purchaser was liable for accrued vacation pay that the vendor owed to the employees who had gone to work

for the purchaser. Mr. Justice Legg, writing for the Court, concluded that the purchaser employer was indeed liable for the accrued vacation pay.

In coming to this conclusion, Mr. Justice Legg adopted the approach taken by Mr. Justice O'Leary, writing for the majority, in *Small v. Equitable Management Limited et al.* (1990), 33 C.C.E.L. 114 (Ont. Div. Ct.) In that case the Court was required to interpret section 13(2) of the Ontario *Employment Standards Act*, R.S.O. 1980, c. 137, a section that dealt with the sale of a business. It read:

> 13(2) **Where an employer sells his business to a purchaser who employs an employee of the employer,** the employment of the employee shall not be terminated by the sale, and the period of employment of the employee with the employer shall be deemed to have been employment with the purchaser for the purposes of Parts VII, VIII, XI, and XII. (emphasis added)

At page 117, Mr. Justice O'Leary stated:

> Section 13(2), when broken into its constituent elements, sets up two preconditions to the operation of the section and then provides two results which flow from those preconditions being met. The preconditions are: (1) that an employer sells his business to a purchaser; and (2) that the purchaser employs an employee of the employer. The two results which flow when these preconditions are met are that (1) the employment of the employee is not terminated by the sale, and (2) the period of employment of the employee with the employer is deemed to have been employment with the purchaser for the purposes of Parts VII (public holidays), VIII (vacations), XI (pregnancy leave), and XII (notice of termination) of the Act. As long as the two preconditions are met, the deeming provision is operative and the employee's total period of employment is deemed to have been employment with the purchaser for the purposes set out. ...

Mr. Justice Legg in applying section 96 (now section 97) of the *Act* to the case before him said the following about the approach taken by Mr. Justice O'Leary:

> In my opinion, that reasoning is applicable to the interpretation of s. 96 of the ESA. The preconditions of s. 96 are similar to the preconditions of s. 13(2). Further, the two results which flow when these preconditions are met are that, for the purposes of the ESA, the employment of the employee is not terminated by the sale and it is deemed to be continuous and uninterrupted by the sale. (at page 34)

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)

The Verrin decision

We now turn to the decision of the British Columbia Court of Appeal in *Verrin*.

Counsel for the excluded employees, counsel for the BCGEU and counsel for the Director submit that the original panel erred in the way it applied the *Verrin* decision to section 97 of the *Act*.

In his reply submission, counsel for the excluded employees states:

> In Verrin, the Court of Appeal ruled that the employee had the option to remain with the predecessor employer and exercise his rights under the collective agreement. Similarly, we submit that under the Act, an employee has the option to remain with the predecessor employer and exercise his or her rights under the Act, even if those rights are limited to pursuing termination notice or pay. In both Verrin and the present case, the issues involve the continuation of an employee's rights in the event of a sale of a business. (at page 3)

And at page 4:

> ... Moreover, in Verrin, the Court held that, for important policy reasons, specific legislative language was required before the legislature could compel an employee to become an employee of a successor employer.

In *Verrin*, the Court was concerned with the "successorship" provision in section 53 of the *Industrial Relations Act*, R.S.B.C. 1979, c. 212 (formerly called the *Labour Code*). Mr. Verrin was employed as a truck driver by the provincial government when the laundry service where he worked was transferred, as a going concern, to a society. The union which represented Mr. Verrin obtained a declaration from the Labour Relations Board that the society was a successor to the government under section 53. The effect of that declaration was that the society became bound by the collective agreement between the union and the government. The issue was whether Mr. Verrin could choose to remain an employee of the government and exercise his rights under the collective agreement with the government or whether, by virtue of the successorship, he became an employee of the society.

The majority of the Court held that section 53 did not make Mr. Verrin an employee of the purchaser society. The majority stated:

> ... In order to make Verrin an employee of the purchaser one must, as Shaw J. said, read words into the statute which are not there. The statute may, in a sense, have provided for the assignment of the collective agreement from the government to the purchaser. It did not provide for the assignment of the employees from the government to the purchaser. ...
>
> ... As Verrin was never employed by the purchaser, he did not become subject to any relationship with the purchaser. His relationship was with the government only and he had the right to grieve pursuant to the collective agreement that the government had wrongly attempted to terminate his employment.
>
> The only way that the interpretation placed by the arbitrator and council on s. 53 can be upheld is to assume that the arbitrator had the legislative power to amend s. 53 by adding the following words to the section: **"and the employees of the former owner of the business shall become the employees of the purchaser, lessee or transferee."** (emphasis added; at pages 22 to 23).

We do not think the original panel erred in its analysis of the *Verrin* decision.

We note the following with respect to the *Verrin* case. First, it involved the interpretation of section 53 of the *Industrial Relations Act*. That legislation governed industrial relations in the province, not employment standards. Section 53 dealt, in large measure, with the preservation of collective bargaining rights upon the disposition of a business; not with the protection of minimum standards of employment.

Second, the language used in section 53 is markedly different than the wording of section 97. We reproduce it here in order to illustrate the contrast:

> *53 (1) Where a business or a substantial part of it is sold, leased, transferred or otherwise disposed of, the purchaser, lessee or transferee is bound by all proceedings under this Act before the date of the disposition, and the proceedings shall continue as if no change had occurred; and where a collective agreement is in force, it continues to bind the purchaser, lessee or transferee to the same extent as if it had been signed by him.*

Unlike, section 53(1), section 97 explicitly states that upon a disposition of a business "*the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.*" In other words, the disposition of a business does not terminate employment because employment is **deemed** to continue for the purposes of the *Act*. We agree with the original panel that the wording of section 97 creates "... the very sort of ongoing employment relationship referred to by the Court of Appeal in *Verrin* ... ."

This does not mean that an employee is obliged to work for a purchaser. What it does mean is that for the purposes of ascertaining and enforcing an employee's entitlements under the *Act*, employment is treated as if it were continuing with the purchaser.

Other grounds for reconsideration

Counsel for the excluded employees (supported by those who seek reconsideration) further submits that the Original Decision gives less protection to employees on the sale of a business than would be provided at common law. He submits that at common law an employee cannot have his services transfered to a different employer without his consent and that on the disposition of a business an employee should not be forced to choose between quitting or working for the new employer.

In our view, the original panel's approach to section 97 (subject to our disagreement with the sentence on page 7 of the Original Decision) does not give employees less protection than they would have at common law.

At common law, the sale of a business which results in the change of the legal identity of the employer constitutes a termination of employment. Consequently, in such a situation an employee could sue the vendor for wrongful dismissal. However, coupled with that right, is the common law duty to mitigate. If an employee were offered employment by the purchaser that were comparable to the employment enjoyed with the vendor, an employee would usually have an obligation to mitigate with the purchaser.

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. Accordingly, such a business disposition does not, *per se*, entitle a vendor's employees to be treated as terminated employees under the *Act*.

However, section 97 does not mean that an employee is forced to work for the purchaser of a business. We reiterate our view that employment is treated as if it were continuous with the purchaser, solely for the purposes of ascertaining and enforcing an employee's entitlements under the *Act*.

It is also appropriate to repeat here that, at common law, a purchaser can expressly contract out of the implied contractual obligation to credit employees for length of service with the vendor. However, by virtue of section 97, a purchaser must (a) credit employees with all statutory benefits based on employment with the vendor and (b) assume all of the vendor's liabilities and obligations towards the employees.

Counsel for the excluded employees also submits that subsection 64(6) of the *Act* must be considered. He submits that "... section 97 does not apply to section 64 of the Act, since to hold otherwise would effectively nullify the meaning of section 64(6) ..."

Subsection 64(6) provides that the group termination provisions contained in section 64 apply "*whether the employment is terminated by the employer or by operation of law*."

The issue that is now before us is the interpretation of section 97. An analysis of subsection 64(6) is not, in our view, required in order to interpret section 97. Because, the meaning of

subsection 64(6), and specifically the meaning of the words "*by operation of law*", are not part of what we have to decide on this reconsideration application, we will not address the interpretation of subsection 64(6) in this decision.

The practical consequences

As stated earlier in these reasons, we have been presented with two different interpretations of section 97. What are the practical consequences of these two different

interpretations? To answer this question we examined some common situations that occur in the working world.

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 that 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*) As well, section 97 would preserve conditions of employment which, if "substantially altered" by the purchaser, would trigger section 66 of the *Act*.

Let us look at the opposite situation. What happens where the purchaser of the business refuses to continue the employment of the vendor's employees following the disposition? According to the interpretation of section 97 advanced by counsel for the excluded employees (and supported by counsel for the BCGEU and counsel for the Director), employment is not deemed continuous and the employees must look to the vendor for compensation for the termination of their employment.

However, having concluded that the employment obligations for the employees are assumed by the purchaser employer following disposition, those employees would be entitled to look to the purchaser to satisfy any claims under the *Act*, including claims resulting from the refusal to continue employment. By giving employees the right to obtain redress from the purchaser, the *Act* assists in the enforcement of wage claims. The purchaser is on site and is in possession of the assets of the business. The vendor might have left the jurisdiction or there could be difficulty accessing the proceeds of the sale.

The next situation to be examined is where the vendor's employees choose not to work for the purchaser. That simple fact does **not,** in and of itself, disentitle employees from claiming they have been terminated. We will assume that the vendor's employees decide not to work for the purchaser because the purchaser is offering conditions of employment that are substantially worse than the conditions that the employees enjoyed with the vendor.

Where should the employees' remedy lie? If section 97 were held not to be applicable, then the employees' remedy under the *Act* would lie against the vendor.

However, having concluded that on the disposition of a business employment is deemed to continue with the purchaser, the employees could allege (subject of course to any statutory defences) that their employment had been terminated by the purchaser. (See: section 66 of the *Act.)* Again, the employees' complaints would be against the purchaser employer.

The last situation that we will look at is where the vendor's employees choose not to work for the purchaser, even though employment with the purchaser would not involve a substantial alteration of a condition of employment. If section 97 were held not to be applicable in this situation, the vendor's employees could treat the disposition as a termination. They would have a *prima facie* entitlement to compensation for length of service and group termination pay (if applicable) from the vendor. However, it is our conclusion that employees who refuse employment under such circumstances have not had their employment terminated by the vendor employer. That is because section 97 deems their employment to be continuous upon disposition, whether or not they go to work for the purchaser employer.

Let us take the point one step further. Is there a valid employment standards reason why an employee should be treated as terminated by the vendor where there has been a change in the legal identity of the employer but no corresponding change in the conditions of employment? We see no valid reason.

Our conclusion on this point is bolstered by looking at the language of section 65(1)(f) of the *Act* which exempts an employee from compensation for length of service (section 63) and group termination pay (section 64) if the employee has "*refused reasonable alternative employment by the employer*". Why then, for the purposes of the *Act*, should an employee who refuses to work at the same position (or a comparable one) that he or she held prior to the disposition be treated as terminated by the employer?

Taken to its logical conclusion, the argument of the excluded employees means that an employee could refuse superior conditons of employment offered by a purchaser and still be entitled to compensation for length of service and group termination pay (if applicable) from the vendor. It also means that even the most "technical change" in the legal identity of the employer could carry with it the right to compensation for length of service and group termination pay (if applicable). An example would be when a sole proprietorship decides to incorporate and conduct business as a company. This would constitute a transfer of a business from the proprietorship to the company and there would be a change in the legal identity of the employer. However, it would most likely involve no change in any aspect of employment. If section 97 did not deem employment continuous, then an employee of the proprietorship, who did not want to continue working for the company, could claim that he was terminated by the proprietorship and was, therefore, entitled to compensation for length of service.

Conclusion

After carefully considering all of the submissions, and looking at the employment standards consequences of those submissions, it is our view that the original panel's interpretation of section 97 should be confirmed, subject to the modification made by this Decision.

In our view, the plain meaning of section 97 is that where there is a 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 employee is deemed to be continuous. To borrow the words of the original panel: "... the employment relationship merely continues with the asset purchaser being, in effect, substituted for the asset vendor as the employer of record." (at page 6)

The deeming of employment to be continuous and uninterrupted is triggered by the fact of the disposition, not by the decision of an employee to continue employment with the purchaser employer.

Where the vendor's employees continue to work for the purchaser, the purchaser is required to honour the employees' length of service with the vendor and to assume all of the vendor's liabilities and obligations towards the employees. As well, and of vital importance, section 97 preserves "conditions of employment" which if "substantially altered" by the purchaser brings section 66 of the *Act* into play.

Where the purchaser of the business refuses to continue the employment of employees who are in the vendor's employ at the time of the disposition, then those employees are entitled to look to the purchaser to satisfy all claims under the *Act*, including claims for length of service compensation and, if applicable, group termination pay (subject to any statutory defences).

Finally, where the vendor's employees refuse to continue employment with the purchaser then the terms of the continued employment must be scrutinized. If continuing employment means accepting a "substantial alteration of a condition of employment", then the employee may be considered terminated pursuant to section 66 of the *Act*. In that situation, the employee would be entitled to claim length of service compensation and group termination pay (if applicable) from the purchaser (subject to any statutory exemptions). If the continued employment does not contain a "substantial alteration of a condition of employment" and the employee rejects it, then the employee cannot say that their employment has been terminated by the employer.

In our view this interpretation of section 97 serves to protect employees, serves the purposes of the *Act*, in particular subsections 2(a) and (b), and fits logically within the scheme of the *Act* as a whole.

ORDER

Pursuant to section 116 of the *Act*, we order that the portion of the Original Decision

(BC EST #D314/97) confirming the delegate's conclusion that the word "employer" in section 65(1)(f) includes an "associated corporation", as designated by section 95, be cancelled.

Pursuant to section 116 of the Act, we order that the portion of the Original Decision (BC EST #D314/97) which cancelled the delegate's interpretation of section 97 of the *Act* be confirmed.

We require the parties to inform the Tribunal, within one month from the date of this Decision, if there are any further matters arising out of the appeals from the Determination that the parties wish the Tribunal to deal with.

_____

Geoffrey Crampton
Chair

_____

David Stevenson
Adjudicator

_____

Sherry Mackoff
Adjudicator