

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

First Equipment Centre Inc.
("First Equipment")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 97/760

DATE OF DECISION: February 19, 1998

DECISION

OVERVIEW

This is an appeal by First Equipment pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination dated September 22, 1997 by the Director of Employment Standards ("the Director").

ISSUE TO BE DECIDED

The issue is whether section 97 of the *Act* applies to employment of Dale Eyben ("Eyben") so that his employment with Case Power & Equipment ("Case") and First Equipment "is deemed, for the purposes of this *Act*, to be continuous and uninterrupted".

FACTS

Eyben was employed as the parts manager by Case from July 14, 1986 at its office in Dawson Creek, B.C. As of December 19, 1996, Case was purchased by First Equipment. On November 20, 1996, Case and Eyben signed a "Termination Agreement". It is a complicated and sometimes confusing document; after setting out the employee's name, social insurance number and position, it states:

Employment Date 07/14/86
Notice Date 12/19/86
Termination Date (Pay-in-Lieu through) 2/13/97

The following information covers items which are important to you relative to your separation from Case corporation:

It defines eligible employees as "regular, full-time salaried employees who work a regular schedule of 40 or more hours per week at locations in the Province of Alberta" (even though it dealt with employees working in this province). The agreement provides a "Transition/Notice Benefit" to any eligible employee continuing as "active employees" until the date of the sale and was paid to employees "where no notice is given". It was referred to as "pay-in-lieu of notice" and was equal to one week's salary (to a maximum of eight weeks) for each year of employment. This payment was made to those Case employees receiving an offer of employment from First Equipment. Another form of payment, "Severance Pay", was paid to any employee not receiving an offer of employment from First Equipment; this was calculated on the basis of one week's salary for each year worked (to a maximum of 26 weeks). To be eligible for severance, the employee would have to stay with Case until the closing of the sale and did not accept employment and actually commence work with First Equipment for 60 days after the sale. Clause 8 of the Agreement stated: "It is the intention of the Company to have this policy comply with the requirements of the Employment Standards Act of B.C." Another document entitled "Estimated Salaried Employee Termination Benefit Calculations" for Eyben set out his weekly and hourly rate on the basis of \$3166 per month and calculated his accrued vacation pay at \$1437.58. It does not set out the payment received from Case.

Eyben filled out an application for employment with First Equipment and on December 13, 1996, accepted an offer of employment as a partsman at a rate of \$3166 per month; his vacation entitlement was calculated on the basis of "10 years". The "Offer of Employment" included the following "Terms & Conditions":

1. Employment commences on the day after First Equipment Centre acquires certain assets from Case Power & Equipment, currently scheduled for December 19, 1996.
2. Employee acknowledges that this position is NOT a continuation of employment with Case Power & Equipment.

3. Employee acknowledges that they have received compensation from Case Power & Equipment with respect to termination of employment effective on or about December 19, 1996.
4. Employee will participate in group benefit plans sponsored by and as may be revised by First Equipment Centre from time to time.

On April 20, 1997, Eyben's employment was terminated and he filed a complaint under the *Act*. The Director's delegate, in a Determination dated September 22, 1997, found that Eyben was wrongfully dismissed and was owed 8 weeks compensation for length of service. It was also found that under section 97 of the *Act*, First Equipment had assumed Case's obligations to Eyben.

First Equipment appeals the Determination with respect to the section 97 obligations, arguing that the amounts paid to Eyben by Case discharge obligations of First Equipment to Eyben. It is submitted that section 97 of the *Act* is not intended to "interfere with the contractual freedom of the vendor and purchaser in determining who is responsible for payment of those financial obligations". The legislation does not specifically state who should be responsible for paying total termination pay and First Equipment should not be required to make an additional payment.

ANALYSIS

Section 97 of the *Act* operates where a business has been sold or transferred and transfers the obligations of the vendor to the purchaser under 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.

This provision was considered by the British Columbia Court of Appeal in *Helping Hands Agency v. British Columbia* (1996) 131 D.L.R. (4th) 336 where where the Court decided that the purchaser of a business was required to pay vacation pay which accrued under previous ownership. The court began with a discussion of the *Act* and its purposes and concluded that "the general purpose of the legislation is to afford protection to the payment of an employee's wages which may not be available to the employee at common law". (at 341) The court adopted the following excerpt from *Ontario (Employment Standards Officer) v. Equitable Management Ltd.* (1990) 74 D.L.R.(4th) 422 (Ont. C.A.) which considered similar provisions in the Ontario legislation:

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. (at 425)

This interpretation was applied to section 97 in this *Act* and will apply whenever an employer's business is sold or otherwise disposed of and employees of the purchaser are employed by the purchaser. This interpretation is at odds with that given a similar provision in the Alberta legislation in *Act Computer Services Ltd. v. Miller* (1990), 20 C.C.E.L. 1, 72 Alta. L.R. (2d) 207 (C.A.) where it was found that a similar provision in the Alberta legislation was not specific enough to require the purchaser to pay for the obligations of the vendor. However, given the facts of this case I adopt the reasoning in *Helping Hands*. Thus, here, where Case's business was sold to First Equipment and Eyben was employed by the purchaser,

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section 97 applies. It means that Eyben's employment is deemed to be continuous, as if the sale had not taken place and he is owed compensation for length of service under section 63 as if he had been continuously employed by First Equipment since July 14, 1986. I am supported in this interpretation by submissions filed on behalf of the Director.

It was argued by counsel for First Equipment that Case's payment to Eyben discharges First Equipment's obligations to pay Eyben compensation for length of service under section 63. I do not agree. The wording of the section does not allow First Equipment to rely on the payment from Case to discharge Eyben's statutory right to compensation for length of service under section 63. More explicit wording would be required. As noted in *Helping Hands*, the *Act* should be generously interpreted to permit employees to recover wages not otherwise payable at common law and the interpretation urged by First Equipment would not respect this approach.

The fact that Eyben signed an agreement acknowledging termination by and payment from Case does not release First Equipment from its obligations under the *Act*. Section 4 of the *Act* makes this clear:

4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect subject to sections 43, 49, 61 and 69.

The agreement, in essence, requires Eyben to waive his rights under section 63 by acknowledging that this position is not a continuation of employment with Case. And none of the exceptions, which arise in unionize workplaces, apply here. Thus, the agreement does not affect Eyben's entitlement.

ORDER

Pursuant to section 115 of the *Act*, I confirm the Determination dated September 22, 1997 in this matter.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal