Citation: Overstory Media Inc. (Re)
2024 BCEST 109

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Overstory Media Inc.

- of a Determination issued by -

The Director of Employment Standards

PANEL:	Kenneth Wm. Thornicroft
SUBMISSIONS:	Pete Harrison, legal counsel for Overstory Media Inc.
FILE NUMBER:	2024/046
DATE OF DECISION:	November 6, 2024

DECISION

INTRODUCTION

1. This appeal concerns the interpretation and application of section 97 of the *Employment Standards Act* (*ESA*) – the so-called "successorship" provision. Briefly, successorship claims arise when the assets of a business are sold and concern the successor's obligations to the vendor's employees. At common law, in an asset sale of a business as a going concern, the vendor's employees as of the date of sale are deemed to have been constructively dismissed (see *Major v. Philips Electronics Ltd.*, 2005 BCCA 170; *Haff v. Valeant Pharmaceuticals International, Inc.*, 2013 BCSC 1720; and *Tonn v. Sears Canada Inc.*, 2016 BCSC 1081).

2. Section 97 negates the common law position – in an asset sale, the vendor's employees are *not* deemed to have been constructively dismissed. Rather, their employment is deemed, for purposes of the *ESA*, "to be continuous and uninterrupted by the disposition." Section 97 of the *ESA* reads as follows:

> If all or part of a business is disposed of, or the business continues to operate under a receiver or receiver-manager, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition or receivership, as applicable.

3. The practical effect of section 97 is that the employees' service-based benefits – such as section 58 vacation pay and section 63 compensation for length of service – will be based on their original date of hire with the *vendor* firm, not their formal date of hire with the successor firm. If the successor employer wishes to terminate these employees after the sale, the successor is obliged to pay all the employees' accrued wages (including those wages that accrued while they were employed with the vendor firm) within 48 hours following termination (section 18).

4. In this case, which concerns the purchaser's liabilities to the vendor's employees in an asset sale, there is a dispute about the date of the "disposition" of the assets. It is not disputed that the employees in question were terminated, without just cause or prior notice, on September 27, 2022. However, there is a question about whether the asset sale closed before or after the employees were terminated. The answer to this question will determine whether the appellant is liable for the employees' unpaid regular wages, accrued vacation pay, and section 63 compensation for length of service.

THE APPEAL

5. Overstory Media Inc. ("appellant"), the alleged "successor employer" in this matter, appeals a Determination issued on April 8, 2024, by Shannon Corregan, a delegate of the Director of Employment Standards ("delegate"). The appeal is based on all three statutory grounds set out in sections 112(1)(a), (b), and (c) of the *ESA* – the delegate erred in law; the delegate failed to observe the principles of natural justice in making the Determination; and evidence is now available that was not available at the time the Determination was being made.

6. By way of the Determination, the appellant was ordered to pay the total sum of $270,819.02 on account of unpaid wages and section 88 interest owed to nine former employees ("complainants") of Vancouver Free Press Publishing Corp. ("VFP"), which published the *Georgia Straight* newspaper. The individual wage awards, including interest, range from about $21,400 to about $42,700, the average being about $30,100. The individual unpaid wage awards include, for each complainant, regular wages, vacation pay, and section 63 compensation for length of service.

7. The delegate also levied a single $500 monetary penalty against the appellant based on its contravention of section 18 of the *ESA*. Accordingly, the appellant's total liability under the Determination is $271,319.02. The delegate issued her "Reasons for the Determination" ("delegate's reasons") concurrently with the Determination.

8. In my view, this appeal is not meritorious and, accordingly, must be dismissed.

BACKGROUND FACTS

9. In February 2020, VFP's founder and sole shareholder sold his entire VFP shareholding to Media Central Corporation Inc. ("Media Central"). Accordingly, Media Central secured effective control over the business affairs of VFP. As described in the delegate's reasons (at page R4), "VFP continued to exist and operate as a legal entity" and "VFP's employees did not become employees of [Media Central]; their employment was uninterrupted by the acquisition and they continued to work for VFP." The delegate's reasons continue (page R4):

> On March 1, 2020, VFP entered into a Services Agreement and a General Security Agreement with [Media Central]. As part of these agreements, VFP granted [Media Central] and certain creditors a security interest over all of its present and after-acquired property, assets and undertakings. VFP also guaranteed full payment of all obligations owed by [Media Central] to certain creditors. In other words, VFP agreed to take on [Media Central's] debt.

10. Following the Covid-19 pandemic, VFP experienced serious financial struggles and in March 2022, Media Central was assigned into bankruptcy.

11. By an "Asset Purchase Agreement" ("APA"), dated as of September 21, 2022, Wei Lin (as vendor) entered into an agreement with the appellant (as purchaser) pursuant to which the latter would acquire most, if not all, of the newspaper's physical operating assets and its intellectual property. Although identified in the APA as the "vendor," Wei Lin was not the actual vendor. Rather, Wei Lin acted in a representative capacity as "a Nominee Holder on behalf of the Debenture Holders as secured creditor of Media Central Corporation Inc. and as secured creditor of Vancouver Free Press Publishing Corp., and not in his personal capacity." Under the March 1, 2020, "General Security Agreement," various creditors obtained secured interests (apparently secured by way of debentures) in the newspaper's assets. Mr. Lin represented these debenture holders when he negotiated the APA.

12. Section 1.01 of the APA described the asset sale as follows:

> **Section 1.01 Purchase and Sale of Assets.** Subject to the terms and conditions set forth herein, *as of the Effective Time (defined below)*, the Vendor hereby sells, assigns,

> transfers, conveys and delivers to the Purchaser, and the Purchaser hereby purchases and acquires from the Vendor, all of the Vendor's right, title and interest in, to and under all of the assets, properties and rights of every kind and nature, whether real, personal or mixed, tangible or intangible (including goodwill), wherever located and whether now existing or hereafter acquired (other than the Excluded Assets), which relate to, or are used or held for use in connection with, the Business, free and clear of any mortgage, pledge, lien, charge, security interest, claim or other encumbrance ("**Encumbrance**"), including the following assets and the assets set forth in Schedule A attached hereto (collectively, the "**Purchased Assets**"): ...
>
> [**boldface** in original text; my *italics*]

13. As noted by the delegate (at page R5), "through the APA, Mr. Lin sold VFP's business in its entirety to [the appellant]." The "Purchased Assets" itemized in the APA included such things as "cash," "accounts receivable," "finished goods," "raw materials," "trademarks," "trade secrets," "websites," "office equipment" and other chattels, and "goodwill."

14. Section 1.04 of the APA set out the financial consideration payable by the appellant to acquire VFP's assets:

> **Section 1.04 Purchase Price.** The aggregate purchase price for the Purchased Assets shall be $400,000 (the "**Closing Amount**") plus the assumption of the Assumed Liabilities (collectively, the "**Purchase Price**"). Purchaser shall pay the Closing Amount to Vendor on the Closing Date by certified cheque or bank draft or by wire transfer of immediately available funds in accordance with the wire transfer instructions provided by Vendor.
>
> **[boldface** in original text]

15. Although the APA did not specify a definite "closing date" (i.e., the date when each party would finally perform their respective obligations under the agreement), the APA did include a "closing" provision (Article II). Section 2.01 reads as follows:

> **Section 2.01 Closing.** The closing of the transactions contemplated by this Agreement (the "**Closing**") shall take place as soon as reasonably practicable following the execution of this Agreement (such date the "**Closing Date**") remotely via the exchange of documents and signatures. The parties agree to use best efforts to close the transactions contemplated by this Agreement no later than October 7, 2022. The consummation of the transactions contemplated by this Agreement shall be deemed to occur at 12:01 a.m., Pacific Standard Time on the Closing Date (the "**Effective Time**").
>
> [**boldface** in original text}

16. Section 2.02 lists several "deliverables" that the vendor was obliged to provide to the purchaser on the closing date including trademark assignments, computer and other account user names and passwords, and "a certificate executed by the Vendor certifying that the Vendor has performed or complied with in all material respects all of its obligations and covenants under this Agreement, in each case, as at the Closing Date." On closing, the purchaser was obliged to deliver to the vendor, among other things, "the Closing Amount in accordance with the terms of Section 1.04."

17. Section 6.04 of the APA required the vendor to terminate all current VFP employees, including those on leave, "commencing on the Closing Date." On September 27, 2022, VFP's president gave the nine complainants verbal notice of termination, which was followed shortly thereafter by written confirmation of termination. The terminations were stated to be effective as of 11 AM on September 27, 2022. Since the employees were terminated without prior written notice, and were never paid any section 63 compensation, the employees' dismissal clearly contravened section 63 of the *ESA*.

18. In addition to section 63 compensation, the complainants were all also owed unpaid regular wages, and vacation pay accrued while on VFP's payroll. VFP's liability to the complainants is not in question here; this appeal raises the question of whether the appellant is liable to the complainants through the application of section 97 of the *ESA*.

19. The delegate determined that for purposes of section 97, the date of the disposition of VFP's "business" was September 22, 2022 – the date when the $400,000 purchase price was paid to the appellant. The delegate also determined that there was "no evidence that VFP's remaining employees were terminated on or before September 22, 2022." The delegate found that the employees were terminated on September 27, 2022. Given this finding, and applying section 97, the delegate held the appellant liable for the complainants' unpaid wages (including vacation pay earned while on VFP's payroll), and for the section 63 compensation payable to each complainant.

THE APPELLANT'S REASONS FOR APPEAL

20. As noted above, the appellant relies on all three statutory grounds of appeal. I will address the appellant's position regarding each ground in turn.

Error of law

21. The appellant's principal argument is that the delegate erred in finding that the date of the disposition of VFP's assets under the APA was September 22, 2022. The appellant concedes that there was a disposition of VFP's assets, and that the complainants' employment ended on September 27, 2022. However, the appellant says that the date of disposition of assets, for purposes of section 97, was September 27, 2022, not September 22, 2022. If the appellant is correct, the complainants would not have been employed by the appellant when they were dismissed which, in turn, would relieve the appellant from any unpaid wage liability through the application of section 97.

Failure to observe the principles of natural justice

22. The appellant says that during the investigation into the complainants' unpaid wage complaints, it was never given clear notice "of the case it had to meet."

23. In addition, the appellant says that the delegate placed too much stock in the evidence of one of the complainants who "provided the vast majority of evidence" regarding the complainants' wage claims. The appellant says that the delegate should have undertaken a thorough examination of this complainant's credibility before relying on her evidence. It is not clear to me whether the appellant is advancing this argument as an alleged error of law, or as a natural justice breach, although I suppose this argument could arguably fall within either of these two statutory grounds.

New evidence

24. The appellant now seeks to introduce into evidence an affidavit sworn by Farhan Mohamed on June 20, 2024. Mr. Mohamed describes himself as the co-founder and CEO of the appellant. I consider the key paragraphs in his affidavit to be as follows:

> 6. Overstory and Mr. Lin intentionally used the word "transactions", plural, in Section 2.01. Several transactions were contemplated by the APA, some of them are recorded in Section 2.02 of the APA. The transactions included transferring the data from The Georgia Straight's shared drive and email server, going to The Georgia Straight's office to take control of some physical assets, and also assets that were in storage. At no time did the parties negotiate or agree that the date the purchase price was forward [*sic*] to Mr. Lin would be the closing date nor would it be the date on which all assets were transferred to Overstory. The parties knew and agreed that some assets may not be transferred until later but that all assets would be transferred and the APA closed by October 7, 2022.
>
> 7. Schedule A to the APA lists the Purchased Assets. Today I cannot recall when all of those assets were transferred to Overstory but some were not transferred until 27 September 2022 or later. My memory is that all the assets were transferred by 30 September 2022.
>
> 8. Overstory and Mr. Lin agreed that the termination of The Georgia Straight's employees was a key part of the APA and the agreement was not intended to close nor would the business be disposed of until after the employees were terminated.
>
> 9. I was not present but have learned from reading documents that Kirk MacDonald [president of both VFP and Media Central] addressed The Georgia Straight staff on 27 September 2022. At no point in time was Kirk MacDonald an employee of Overstory or an agent of Overstory.
>
> 10. The negotiation with Mr. Lin was unusual because he was the creditor representative while the operator of The Georgia Straight was VFP. Mr. Lin had legal rights to sell [Media Central] assets and VFP, directed by Kirk MacDonald, had legal rights to manage and operate The Georgia Straight. Discussions took place and Kirk MacDonald agreed that he would notify employees of The Georgia Straight that their employment had ended and that VFP would be responsible for paying employees any wages or related pay to which they were entitled and the directors of VFP held insurance to pay money owing to the employees.

25. While conceding that this affidavit is arguably not "new evidence", the appellant nonetheless says it should be admitted under section 112(1)(c) because it "did not anticipate that the issues to be determined were whether the closing date of the APA was 22 September 2022 and whether the date on which a part of the business was disposed of was 22 September." The appellant also says that it "could not have foreseen the Delegate would analyze the issues in the manner they did."

FINDINGS AND ANALYSIS

Section 97 of the ESA

26. Insofar as section 97 is concerned, the law is clear that all employees on the vendor's payroll as of the date of the disposition are deemed to have continued their employment with the purchaser. This deeming provision does not require the negotiation of new employment contracts between the affected employees and the purchaser (see *Mitchell v. British Columbia (Director of Employment Standards)*, 1998 CanLII 3983 (B.C.S.C.)). Further, the terms of the agreement governing the disposition of the business assets are, for the most part (subject to one important caveat, discussed below), irrelevant. The key question is whether the employees' employment relationship with the vendor ended prior to the date of the disposition. If the vendor's employees were terminated *prior* to the disposition of the business assets, section 97 does not apply and there is no deemed continuity of employment (see *Director of Employment Standards*, BC EST # RD046/01). However, if the vendor failed to terminate the employees – even if this failure constituted a breach of the asset sale agreement – section 97 applies, and the employees' employment is deemed to continue with the purchaser. In this latter event, the purchaser may have a right of action against the vendor, but that fact does not immunize the purchaser from the legal effects of section 97.

27. The terms of the asset sale agreement may be relevant, however, in terms of understanding when the disposition of the business assets occurred. Section 97 refers to all or part of the business being "disposed of," but this phrase is not defined in the *ESA*. However, section 29 of the *Interpretation Act* states: "In an enactment: ...**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." This is a very expansive definition, and section 97 must be interpreted broadly consistent with the *ESA* being a benefits-conferring statute (see, for example, *Strata Corporation NW 1018 (Holly Park Lane)*, BC EST # D083/14).

The date of disposition

28. The delegate found that the "disposition" of VFP's business assets occurred on September 22, 2022. The appellant says that the disposition did not occur until September 27, 2022: "The factual matrix is that [the appellant] did not exercise control over The Georgia Strait or related assets prior to 27 September 2022...There was no evidence before the Director to suggest that [the appellant] exercised or was entitled to exercise any control over the assets prior to 27 September 2022."

29. Asset sale agreements typically include several different dates – the date the agreement is negotiated, the date by which certain "due diligence" efforts or conditions precedent must be satisfied, and the "closing" or "completion" date. This latter date generally refers to the date when the purchase price is paid and title to the assets is transferred.

30. The appellant relies on several provisions of the APA to support its position that the "closing date" was September 27, 2022, not September 22, 2022 (as was found by the delegate). In particular, the appellant says:

- "Throughout the negotiations of the APA the parties knew and agreed that the closing date of the APA would be after The Georgia Straight employees were terminated";

- "…the parties agreed in Section 6.04 of the APA that the Closing Date would be the date on which employees of VFP would be terminated"; and
- "[The appellant] did not assume any obligation to pay salary, wages or other compensation payable by VFP to current or former employees of VFP. This was the intention of the parties."

31. The fundamental *quid pro quo* in an asset sale agreement (a bilateral contract) is the vendor's promise to transfer the assets in question given in exchange for the purchaser's promise to pay for those assets. In this transaction, the appellant was acquiring certain assets for the sum of $400,000 (in addition to assuming certain liabilities). By section 1.04 of the APA, the purchaser agreed to pay this sum (the "closing amount") to the vendor "*on the Closing Date* by certified cheque or bank draft or by wire transfer of immediately available funds in accordance with the wire transfer instructions provided by Vendor" (my *italics*). Section 2.02(b)(i) of the APA obliged the purchaser to deliver the "closing amount" to the vendor "*at the Closing*" (my *italics*). In this case, as already noted, the purchase price was paid on September 22, 2022, a fact supporting the delegate's finding that the asset sale closed on September 22, 2022.

32. The section 112(5) record includes a copy of the proof of payment for the $400,000 purchase price on September 22, 2022, as well as a copy of the certificate contemplated by Section 2.02(a)(iv) of the APA, dated September 22, 2022, "certifying that the Vendor has performed or complied with in all material respects all of its obligations and covenants under this Agreement, in each case, *as at the Closing Date*" (my *italics*). In addition, the section 112(5) record also includes an August 30, 2023, email to the Employment Standards Branch from the solicitor (a partner in a well-established national law firm) representing the vendor in the asset sale transaction which confirms the following: "Closing of the sale of the assets of VFP to Overstory Media Inc. was September 22, 2022."

33. In addition to the APA, VFP and the appellant executed a "Trademark Assignment Agreement" ("TAA"), which states that it is "dated and effective" as of September 22, 2022. This agreement confirms that VFP's various trademarks, which were to be assigned to the appellant under the APA, were assigned to the appellant as of September 22, 2022. Mr. Mohamed executed the TAA on behalf of the appellant.

34. The interpretation of a commercial agreement involves questions of mixed fact and law (see *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53), and as such, a decision-maker's interpretation of such an agreement can only be set aside if it is tainted by a "palpable and overriding error" (see *Housen v. Nikolaisen*, 2002 SCC 33).

35. I am unable to conclude that the delegate made a palpable and overriding error in determining that the APA closed on September 22, 2022. The APA specifically provided (in section 1.04) that the $400,000 purchase price would be paid "on the closing date." Section 2.02(b)(i) of the APA obliged the purchase to pay $400,000 to the vendor "at the Closing." The uncontested evidence before the delegate is that the $400,000 payment was made on September 22, 2022, compelling evidence that the closing date was, in fact, September 22, 2022.

36. Section 2.02(a)(iv) of the APA required the vendor to deliver a certificate to the appellant "certifying that the Vendor *has performed or complied with in all material respects all of its obligations and covenants under this Agreement*, in each case, *as at the Closing Date*" (my *italics*). This certificate

was delivered to the appellant on September 22, 2022. There is no evidence in the record showing that the appellant ever contested this certificate, or otherwise claimed that the vendor had not complied with all its obligations under the APA as of September 22, 2022.

37. The appellant claims that several of the "deliverables" itemized in section 2.02 of the APA "were completed after 22 September." However, this assertion is not supplemented by any further particulars, and there is no corroborating evidence in the record to support it. Mr. Mohamed, in paragraph 7 of his affidavit – which is submitted as "new evidence in this appeal" – states that while he "cannot recall when all of those assets were transferred to Overstory…some were not transferred until 27 September 2022 or later," and that his "memory is that all the assets were transferred by 30 September 2022." This statement is not corroborated by any documentary evidence and, in any event, falls well short of clear and cogent evidence that the asset sale transaction closed sometime after September 22, 2022. I also note, in relation to the assignment of VFP's trademarks, that the assignments were made on September 22, 2022, with Mr. Mohamed executing the TAA on the appellant's behalf. In any event, and for reasons discussed below, I do not consider Mr. Mohamed's affidavit to be admissible in this appeal and, accordingly, its contents are not properly before me.

38. Even if it could be said that there were some other details to be attended to after September 22, 2022 (and I cannot so find, based on the evidence before me), the *fundamental* exchange – namely, the payment of the funds in exchange for title to the transferred assets – appears to have been consummated on September 22, 2022.

39. Perhaps the most compelling evidence supporting the delegate's finding that the APA closed on September 22, 2022, is the written statement from the vendor's solicitor that the "Closing of the sale of the assets of VFP to Overstory Media Inc. was September 22, 2022." If I were to accept the appellant's position that the APA did not close on September 22, 2022, I would also have to find that the solicitor's statement was a deliberate misrepresentation. I am not prepared to make such a finding. First, the solicitor has no incentive that I can see to make such a false representation. Second, the solicitor's statement is consistent with other evidence indicating that the asset sale closed on September 22, 2022. Third, there is no statement in the record from the solicitor who represented the appellant in the asset sale that contests the vendor's solicitor's statement regarding the closing date.

40. The appellant says that the phrase "disposed of" in section 97 of the *ESA* must be interpreted in the same fashion as "dispose of" as used in section 94 of the *ESA* (a provision concerning assets that have been seized by the Director of Employment Standards). While I do not necessarily disagree with the appellant's assertion on this score, there is nothing in the appellant's argument that supports its bald assertion that the delegate's interpretation of section 97 in this case is inconsistent with how the term "dispose of" has been interpreted in the context of a section 94 wrongful removal of assets.

41. In my view, the appellant's argument that both parties to the APA "knew and agreed that the closing date of the APA would be after The Georgia Straight employees were terminated" is neither relevant nor cogent. Section 6.04 of that agreement contemplated the termination of VFP's remaining employees "commencing on the closing date." The APA also contemplated that the appellant would not assume any liabilities with respect to these terminations. However, VFP's employees were not parties to the APA – and thus are not bound by any of its provisions – and the parties to the APA are not permitted to "contract out" of the *ESA* (see section 4).

42. Even if the parties to the APA perhaps *intended* that VFP's employees would be terminated prior to the closing of the asset sale, that intention is not sufficient to discharge the appellant's liability under section 97 (see, for example, *M3 Personnel Group Inc.*, BC EST # D129/16). To the extent that the vendor breached its obligations regarding the termination of VFP's employees (and I am making no finding in that regard), the appellant's remedy lies in a claim against the vendor. If there were such a breach of the APA, that breach does not affect the complainants' entitlements flowing from the application of section 97 of the *ESA*.

Failure to observe the principles of natural justice

43. The appellant says that during the investigation into the complainants' unpaid wage claims, it was never given "notice of the case it had to meet." Undoubtedly, a respondent party to a civil claim is entitled to know, and be given an opportunity to respond to, the claim advanced against it. This principle is codified in section 77 of the *ESA*: "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond."

44. On January 11, 2024, the Employment Standards Branch officer assigned to investigate the complainants' unpaid wage claims, issued an "Investigation Report" (IR). The IR summarized the issues in question and the parties' positions and evidence. This report was part of the record the delegate relied on in issuing the Determination. The IR was provided to all parties, including the appellant, as well as to the corporate parties' directors and officers (including Mr. Mohamed), for their review and response. The parties were advised to respond to the IR by no later than January 25, 2024, and further advised that their responses would form part of the evidentiary record that would be relied on in making a final determination with respect to the complainants' claims.

45. The appellant's legal counsel (not the same counsel who represents the appellant in this appeal) filed a response to the IR on January 25, 2024. This submission was principally filed on behalf of the appellant, but also made submissions in relation to Mr. Mohamed and the appellant's other two directors and one officer.

46. At page IR8 of the report, the officer defined one of the issues to be adjudicated as follows:

> 2. Is the Employer's business disposed of? If so, what is the date of disposition?
>
> a. Were the Complainants employed at the time of disposition?
>
> [my underlining]

In my view, the officer clearly indicated to the parties that the date of the disposition, and the complainants' status as of that date, were issues that would have to be adjudicated in a final determination.

47. At pages IR12-IR13, the Employment Standards Branch officer stated:

> In September of 2022, Nominee Holder Wei Lin acting as secured creditor of [Media Central] and secured creditor of VFP, sold VFP assets to Overstory. The Nominee Holder and legal counsel for Overstory provided a copy of the Asset Purchase Agreement (APA) to the Branch. According to the APA, dated September 21, 2022, the purchase price of $400,000.00 was to be paid on the closing date. Section 6.04 reads:

> "Commencing on the Closing Date, the Vendor shall cause the termination of all individuals currently employed by VFP, whether on a full-time or a part-time basis, whether active or inactive as of the Closing Date, including an employee on statutory or approved leaves of absence (including maternity leave, parental leave, short term or long term disability leave, workers' compensation and other statutory leaves) (each a "VFP Employee") and all liabilities owing to any such VFP Employees in respect of such terminations, including but not limited to all amounts owing on account of statutory notice, termination payments, severance, vacation pay, benefits, bonuses or other compensation or entitlements, shall be Excluded Liabilities."

The Nominee Holder provided a screenshot of a banking transaction which establishes Overstory made a $400,000.00 payment to Wei Lin on September 22, 2022.

On September 27, 2022 Kirk MacDonald held a zoom meeting with the remaining staff. An audio recording of the zoom meeting was provided by one Complainant and has been transcribed by the Branch. Kirk MacDonald followed up the zoom meeting with a letter, a copy which has been provided by the parties. It is dated September 27, 2022 and signed by Kirk MacDonald. It states:

> "Vancouver Free Press has been liquidated per the Media Central bankruptcy proceeding and the assets have been sold to a local publisher…For further clarity, please consider this written notification that all employees of Vancouver Free Press Publishing Corp. are terminated as of 11am today, Sept 27, 2022."…

The Complainants do not know what legal entity is responsible for paying their outstanding wages. It is their understanding that after the [Media Central] purchase, VFP continued to operate, but as a subsidiary of [Media Central]. Due to COVID-19 and a subsequent lawsuit filed by a former colleague, [Media Central] declared bankruptcy. The Complainants continued to work as the Georgia Straight continued publishing. A group of creditors, led by Wei Lin, took over assets and sold them to Overstory. Operations and staff were not part of the Overstory sale, and the Complainants were left with no recourse to collect outstanding wages. Some filed with WEPP but were denied on the basis that [Media Central] was a parent company with no employees.

[my underlining]

48. At page IR38, the officer stated: "The Respondents do not dispute the Complainants are owed wages, rather they each dispute liability" (my underlining). At page IR41, the officer set out the appellant's position:

> **Summary of Capital City News Group Ltd. - Overstory Media Inc. Information:**
>
> A Production of Records was issued on July 27, 2023 to director Farhan Mohamed. In the absence of a reply, a Revised Production of Records was issued on August 29, 2023 to Overstory, and all directors of this entity. Overstory produced records September 13, 2023. In their reply, they noted they did not have the Complainants' payroll records.
>
> Information provided by Overstory's legal counsel Stephanie Gutierrez (Ms. Gutierrez)
>
> *The Complainants were not employees of Overstory.*

> Overstory entered into an Asset Purchase Agreement with the creditors of [Media Central] and VFP to purchase certain assets of VFP that were seized by such creditors.
>
> Ms. Gutierrez provided a copy of the Asset Purchase Agreement, Trademark Assignment Agreement, Certificate of Vendor and the vendors written Termination Letter. She notes that under section 6.04 of the Asset Purchase Agreement, on the closing date, the Vendor is obligated to terminate the employment of all VFP employees, and *all liabilities owing to such employees are Vendor liabilities*.
>
> [**boldface** and underlining in original text; my *italics*]

49. In its January 25, 2024 one-page response to the IR, the appellant's legal counsel did not address section 97 of the *ESA* even though the officer specifically identified this provision as a matter that would have to be adjudicated (i.e., "Is the Employer's business disposed of? If so, what is the date of disposition?"; "Were the complainants employed at the time of the disposition?" (my underlining)). The appellant's response to these questions was to simply maintain that whatever monies the complainants might be owed, they were never employed by the appellant, and that their monetary claims were "excluded liabilities" under the APA. The appellant's legal counsel could have addressed, but for some unexplained reason failed to address, the possible application of section 97 in this case. There is nothing in the record from the lawyer who represented the appellant in the asset sale explaining why the appellant never addressed the section 97 issue, despite it having been raised in the IR as an issue that would have to be adjudicated in a final determination.

50. I am satisfied that the appellant was given a fair opportunity, consistent with section 77 of the *ESA*, to address the section 97 issue but for some inexplicable reason, its legal counsel failed to do so in any comprehensive manner.

51. If I am incorrect in concluding that there was no breach of section 77 in this instance, I am nonetheless satisfied that any breach has been fully cured by this appeal proceeding, in which the appellant's natural justice argument has been fully aired and considered (see, for example, *Alexander McCormack Client Support Group Society*, 2021 BCEST 97; *Diar Restaurant Ltd.*, BC EST # RD072/13; and *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97).

Failure to assess a particular complainant's evidence

52. The appellant says that one complainant ("TR"), who was VFP's accounting supervisor, "provided the vast majority of the evidence relied on by her and the other complainants to prove employment, length of employment, wages or salary earned, vacation pay and compensation for length of service pay." The appellant further says that because TR effectively acted as the complainants' spokesperson, the delegate should have "undertake[n] a review of the law of credibility assessment" and that her failure to do so is "fatal" to the Determination. I do not consider this argument to be meritorious.

53. In the IR, the Employment Standards Officer itemized, in considerable detail, the unpaid wage claims relating to each of the complainants. These individual claims were ultimately accepted by the delegate with only very minor adjustments. The IR also identified the source of the unpaid wage calculations (at page IR15):

> [TR] provided the Branch with [Records of Employment] and copies of the final ADP master control report (ADP Report).
>
> Each Complainant provided various supporting documents including but not limited to; employment agreements, wage statements, T4's [*sic*] and ROE's [*sic*]. Many Complainants received correspondence from [TR] at the end of their employment detailing their outstanding wages. Correspondence was by email and typically included a worksheet reflecting unpaid wages (Unpaid Wage Worksheet) according to pay period and/or a simple summary of outstanding wage totals (Unpaid Wage Summary).

54. As noted in the IR (page IR38), none of the respondents ever challenged the complainants' unpaid wage claims; rather, each only disputed their own separate liability for those unpaid wages. In her January 25, 2024 response to the IR, the appellant's legal counsel never contested the calculation of any individual complainant's unpaid wage claim. If the appellant wished to challenge these unpaid wage calculations, it should have done so in its written response to the IR. In my view, the appellant is now estopped from challenging, in this appeal, the calculation of the complainants' individual unpaid wage awards based on the *Tri-West Tractor/Kaiser Stables* principle (see *Tri-West Tractor Ltd.*, BC EST # D268/96 and *Kaiser Stables Ltd.*, BC EST # D058/97). Further, the appellant has not provided a scintilla of evidence in its appeal submission that would call into question the delegate's unpaid wage calculations.

New evidence

55. As noted above, I do not consider Mr. Mohamed's affidavit to be admissible under section 112(1)(c) of the *ESA*. First, the assertions contained in the affidavit all concern matters that pre-date the issuance of the Determination. Second, the issue relating to when the "disposition" of VFP's business assets actually occurred was specifically raised in the IR. However, the appellant chose not to address this issue. The appellant could have included in its written response to the IR all the evidence that is now set out in the affidavit. Third, the assertions contained in the affidavit are rather vague and, at least in some respects, stand in direct conflict with other highly credible evidence that is contained in the record, including the TAA which Mr. Mohamed signed on behalf of the appellant. All told, I consider the evidence set out in the affidavit to have little, if any, probative value. Based on an application of the *Davies et al.* criteria (see BC EST # D171/03), I find that Mr. Mohamed's affidavit is not admissible in this appeal.

CONCLUSION

56. Having considered each of the appellant's separate grounds of appeal, I find that none is meritorious. Accordingly, there is no need to seek submissions from the complainants or from the Director of Employment Standards. In my view, none of the reasons advanced in support of this appeal has any reasonable prospect of succeeding and, that being the case, the appellant's appeal must be dismissed.

THE APPELLANT'S SUSPENSION REQUEST

57. I understand that the full amount of the Determination was paid to the Director of Employment Standards in early April 2024 and, presumably, is currently being held in the Director's trust account. The appellant applied for a suspension of the Determination under section 113 of the *ESA* on the

condition that the full amount of the Determination be deposited as provided for in section 113(2)(a). However, given my decision with respect to the merits of the appeal, there is no need for a suspension order in this matter.

ORDER

58. Pursuant to sections 114(1)(f) and 115(1)(a) of the *ESA*, this appeal is dismissed, and the Determination is confirmed as issued in the total amount of $271,319.02 together with additional interest that has accrued under section 88 of the *ESA* since the date of issuance.

/S/ Kenneth Wm. Thornicroft

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal