Employment Standards TRIBUNAL

An appeal

- by -

Nanaimo Seniors Village Partnership & Well-Being Seniors Services Ltd.
(the "Appellants")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

TRIBUNAL MEMBER: John Savage

FILE No.: 2006A/105

DATE OF DECISION: January 23, 2007

DECISION

SUBMISSIONS

David T. MacDonald, Fasken Martineau DuMoulin LLP
Counsel for Nanaimo Seniors Village Partnership & Well-Being Seniors Services Ltd. (the "Appellants").

G. James Baugh, McGrady & Company
Counsel for various employees (the "Employees")

Michelle J. Alman, Ministry of Attorney General
Counsel for the Director of Employment Standards (the "Director").

INTRODUCTION

1. The Appellants appeal a Determination of the Director dated July 24, 2006. The Determination found that the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the "*Act*") had been contravened and ordered the Appellants to pay $729,761.87, on account of unpaid annual vacation pay (section 18), group termination pay (section 64), accrued interest (section 88), and an administrative penalty (of $500).

2. Briefly, the Director found that there was a group termination of the employees at the Nanaimo Seniors Village. The Director held that the group termination was made without adequate notice and thus the *Act* was contravened. As a result of that finding the Director found that annual vacation pay and group termination pay was due the employees, including casual employees.

3. The Appellants say that that Director, in making his finding that there was a group termination, failed to give effect to section 97 of the *Act*. Section 97 of the *Act* provides that 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 the *Act*, to be continuous and uninterrupted by the disposition. Had the Director given proper affect to section 97, the Appellants say, he would have concluded that the employment of the employees was continuous and there was no group termination. Accordingly, nothing is owed.

4. The Appellants argue that instead of finding that the requirements of section 97 have been met the Director's contrary finding provides a windfall to the employees who have suffered no loss.

5. As an alternate position, the Appellants say that the inclusion of casual employees as employees entitled to notice of group termination was wrong.

6. In appealing to this Tribunal, the Appellants say that the Director's finding not to give effect to section 97 was an error of law, that the inclusion of casual employees for the purpose of providing section 64 notice was an error of law, and that the manner in which the investigation was conducted amounted to a denial of natural justice. The Appellants also take issue with the calculations of monies the Delegate found owing to the employees and inclusion of employees on leave. The Appellants have also requested an oral hearing. The Respondents join issue with the Appellants on all issues.

ISSUES

7. The issues are as follows:

1. Did the Director's finding that the conditions of section 97 were not met involve an error of law, or was this conclusion an error of law?

2. Did the Director's inclusion of casual employees in the group entitled to section 64 notice involve an error of law, or was this conclusion an error of law?

3. Was the manner in which the investigation was conducted amount to a denial of nature justice?

4. Is an oral hearing required in the circumstances of this case?

5. Is the calculation of the entitlements correct?

6. How should the on-leave employees be treated?

FACTS

8. The Nanaimo Seniors Village is a licensed residential care facility owned and operated by the Appellant Partnership. Care services at the facility are provided by Licensed Practical Nurses ("LPNs"), Residential Care Aides ("RCAs"), Registered Nurses ("RNs") and Activity Aides ("AAs").

9. By the end of May, 2004 all care services employees were being paid by the Appellant Well-Being.

10. During the spring and early summer of 2004 the Appellants began contemplating terminating the contract for care services with Well-Being and re-tendering it to another labour contractor.

11. The period of July and August 2004 was a period of uncertainty at the Nanaimo Seniors Village. There was an application before the Labour Relations Board ("LRB") for certification of the LPNs by the Hospital Employees Union (the "HEU") which was filed on June 30, 2004. The Appellant Partnership in the meantime was seeking alternate care services contractors. The history of the relationship between the employees and the Appellant Partnership is outlined in the Determination but it is unnecessary to repeat it here.

12. The Delegate noted that the Appellant Partnership had, before the LRB, expressed concern that because of the close association of Well-Being and the Partnership, Well-Being may not be seen as an independent entity. To meet its business objectives of avoiding the Health Sector Master Agreement, and maintaining certain cost savings realized by contracting to Well-Being, the Partnership needed to contract with a third party to establish an arms length relationship with a contractor that was not part of the Retirement Concepts group of companies (Nanaimo Seniors Village et al).

13. The administration of the Nanaimo Seniors Village held a meeting with the RCAs, AAs and RNs employed by Well-Being on July 14, 2004 at which time the employees were advised that the Partnership intended to replace Well-Being with another contract care services provider. A similar but separate

meeting was held with the LPNs where another issue concerned whether the LRB would permit the LPN positions to be included in the new contract.

14. Between July 14 and July 28, 2004 the Partnership entered into more detailed discussions with potential contractors. On July 28, 2004 the administration then met with the RCAs, AAs, RNs and LPNs and advised that Well-Being would no longer be providing care services at the facility effective September 9, 2004 and that another company Bayshore Facility Care Management ("Bayshore") would be issued the contract.

15. At the July 28, 2004 meeting the employees were advised that their employment contracts with Well-Being would be terminated. The employees were advised that Well-Being was not able to guarantee that all employees would be rehired by Bayshore.

16. On July 28, 2004 the Appellant Partnership sent Well-Being notice of Termination of Contract which advised that the Well-Being contract would be terminated effective September 9, 2004 at 6:30am.

17. On August 4, 2004 Well-Being provided the care employees with written confirmation that the Well-Being contract with the facility was to be terminated and their employment with Well-Being would cease, effective September 9, 2004 at 7:00am. The employees were also advised that Bayshore would be contacting them to discuss any employment terms. The letter reads as follows:

> "The purpose of this letter is to confirm the information given to you during the employee meeting on July 28, 2004. Effective September 9, 2004, the care service contract between Nanaimo Seniors Village and Well Being Seniors Services Ltd. will be terminated. The new contracted care service provider is Bayshore Healthcare. Your employment with Well Being Seniors Services Ltd. will end at 7:00am on September 9, 2004.
>
> During the meeting on July 28, 2004, we explained that the continuity of care is a strong priority for Nanaimo Seniors Village. To this end, we are advised that Bayshore Healthcare will be in contact with you to discuss any employment terms it proposes to extend to the current care team".

18. On August 5, 2004 a memorandum was circulated by Well-Being containing the following statement:

> "Your letters are NOT lay-off notices. Nothing has changed from what Mary told you last week. Well-being (as of Sept 9) will NO LONGER be the contracted service provider at NSV. That is all the letters are for. NO ONE has been laid-off".

19. On August 6, 2004 a further memorandum was circulated to the employees. It said in part:

> "The letters issued on August 4, 2004 are notices of termination of your employment with Well-Being. A new contractor has been selected. We are doing everything we can to ensure continuity of care at the Facility. This means we believe that the same employees should remain caring for the same residents in the same roles. While we are taking these positions that decision is ultimately up to the new contractor. We are confident that the new contractor will see the wisdom of our position, but, we cannot make any assurances on what is going to happen in the future. Those decisions are to make by the new contractor".

20. Bayshore and the Appellant Partnership, however, did not come to terms.

21. On August 16, 2004 Bayshore wrote that it would be withdrawing from the RFP process. Instead the Partnership entered into discussions with CareSource Solutions Inc. ("CareSource"). An agreement in principle was reached with CareSource August 17, 2004. The exact terms of the agreement in principle are not in evidence. The agreement in principle was memorialized in writing only in December, 2004 and the written agreement references that it commences 7:00am September 9, 2004.

22. The Agreement says it is "made the 1st day of September, 2004". Under the signature of the contracting parties the annotation "Date: September 1 st, 2004" occurs and under the signatures of the witnesses the annotation "Date: September 1 st, 2004" occurs. Each page of the agreement, however, references in the footer that the written document was produced "…09Dec04….". The Agreement by paragraph 4(a) is for "…five (5) years in duration beginning on September 9th, 2004 at 7:00AM Pacific Standard Time…."

23. CareSource commenced the process of interviewing the Well-Being employees on or about August 25, 2004. It eventually hired all of the Well-Being employees, except nine. Of the employees that were kept the terms and conditions of employment with CareSource are similar to, but not the same as, the terms and conditions of employment with Well-Being.

24. Well-being issued Records of Employment ("ROE") to the employees. The ROEs issued to the employees by Well-Being stated that the last day of employment was September 8, 2004 not September 9, 2004.

25. The Well-Being employees that were hired by CareSource signed contracts of employment that are stated to be "made as of" September 9, 2004, although the contracts also say that "this Agreement has been executed by the parties hereto on the date first written above". These contracts which were signed at various times are stated to take effect on a date to be mutually agreed. That date is not specified. The contract says that "The Company formally offers to employ Employee on a date mutually agreed upon by both Employee and CareSource".

26. The Delegate interviewed the President of CareSource who advised that it was his understanding that the employees they hired to work for CareSource September 9, 2004 were new employees to CareSource and that they had no obligations to them. The employees signed contracts of employment as new employees of CareSource. While generally the conditions of employment remained the same, CareSource was a different employer so there may have been some different processes to follow. This discussion was referenced in the Delegate's preliminary finding.

27. After a preliminary ruling by the Delegate, on July 25, 2005 legal counsel for CareSource wrote to the Delegate saying there was a misunderstanding and that CareSource anticipated a seamless transition from Well-Being to CareSource with no break in employers and that CareSource would honour the previous tenure of its employees with Well-Being. Further, legal counsel later wrote that they were of the view that section 97 of the *Act* applied.

28. There is a dispute on the appropriate characterization of these events. Well-Being, based on affidavits sought to be introduced in this appeal, and what it says was the evidence before the Delegate, describes the events in the following terms (in their original submission, page 6, paragraph 17):

> "Employees were advised that the effect of this transition would be that their employment contracts with Well-Being would be terminated. The employees were advised that every effort would be made to attempt to have continuity in care services provided between the contractors, however, Well-Being was not able to guarantee that all employees would be rehired by Bayshore.

> Continuity of care means the same people doing the same jobs. In its discussions with contractors, the Partnership insisted on a seamless transition between Well-Being and the successful bidder".

29. The Respondents and the Director take issue with this characterization. This characterization was not adopted by the Delegate in his Determination, but it is consistent with the evidence.

CASUAL EMPLOYEES

30. The Delegate with the assistance of payroll department at the Nanaimo Seniors Village considered the issue of whether his Determination should include casual call-in staff ("casuals").

31. Of 112 employees some 61 were full or part time and a further 51 were casuals. He found that the casuals are called on a seniority basis, may work for one or two days a week, or for three or four days a month, or work for longer periods of time covering illness, vacation, WCB or maternity leaves.

32. The Delegate delivered preliminary findings on June 21, 2005. He had received submissions from the parties prior to delivering those preliminary findings. The Appellants made submissions March 18, 2005 and the Employees made submissions April 4, 2005. Both those submissions addressed the issue of casual employees.

33. The Delegate made it clear that the preliminary findings were not a Determination under the *Act*. The letter including the preliminary findings contained a proposal for resolution that was not binding on the parties. In the preliminary findings the Delegate discussed the issue regarding casuals as follows:

> My discussions with the administration, staff representatives and payroll personnel found that there were a large number of casual on-call employees who may work 1 or 2 days a week, 3 or 4 days a month or work for longer periods of time covering illness or vacation relief. The numbers increase in the months when the staff take vacations. A large number of casual on call in staff appears to be common in the health care industry at this time. These employees can accept or reject a call to work without repercussions as they are called according to a seniority list. This would lead me to believe that section 65 1 (a) correctly applies to these casual on call staff thus excluding them from the count in determining the application and entitlement under section 64.

34. Counsel for the current Appellants who was also counsel before the Delegate wrote on July 15, 2005 giving reasons for rejecting the settlement proposal. Not surprisingly, there is no mention of the casual employees in that correspondence, as the correspondence takes issue only with the findings that are adverse to the Appellants. Counsel for the complainants wrote on August 4, 2005 replying to this submission. There is no mention of the Delegate's finding on casuals in this submission. A reply submission was delivered by counsel for the Appellants on August 12, 2005. There is no mention of casuals in this correspondence.

35. On August 22, 2005 the Delegate wrote to the parties. The Delegate said:

> Sending the parties to a dispute an account of our preliminary findings is a common practice at the Employment Standards Branch. It helps the parties know what our investigation has found up to that point and gives them the opportunity to respond with additional evidence or clarification of some of those issues. Your submissions have done both and given me additional information to consider,

36. There were no further submissions or requests for information from the delegate on the standing of casual employees. On appeal, the Appellants produced a lengthy written submission dated August 31, 2006. Counsel for the Employees produced a lengthy written submission dated October 10, 2006 as did counsel for the Director. The Appellants produced their final reply November 6, 2006. Following these submissions a late unsolicited submission was received from counsel for the Director on November 7, 2006. Submissions on this late submission were received on December 18, 2006 from counsel for the Appellants and on December 14, 2006 from counsel for the Employees.

ORAL HEARING

37. In the written submission of Well-Being it asks for an oral hearing. It made submissions before the Delegate with respect to the holding of an oral hearing. It further submitted that Tribunal must allow the Appellants to present all of the relevant evidence at the appeal hearing that they might have presented at the investigation.

38. The purpose of an oral hearing before this Tribunal is not to allow the introduction of new evidence. The Tribunal has established rules with respect to the introduction of new evidence focused on the meaning of Section 112(1)(c) of the *Act*.

39. There is no requirement under the *Act* for the Delegate to hold a hearing. When an investigation is conducted under Section 77 there is a requirement that a person who is the subject of the complaint be made aware of the nature of the complaint and be given a reasonable opportunity to respond: *Re Medallion Developments Inc.,* [2002] B.C.E.S.T.D. No. 230, BCEST #D235/00.

INDIVIDUAL AND GROUP TERMINATION, SECTIONS 63, 64

40. Section 63 and section 64 of the *Act* create statutory liabilities on an employer based on an employees' length of service.

41. Where the employment of an employee is terminated without cause or adequate notice, as measured by the *Act*, there are requirements to pay statutory termination pay or to give a combination of statutory termination pay and notice sufficient to meet the statutory notice requirements:

> 63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
>
> (2) The employer's liability for compensation for length of service increases as follows:
> (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
> (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.
>
> (3) The liability is deemed to be discharged if the employee
> (a) is given written notice of termination as follows:
> (i) one week's notice after 3 consecutive months of employment;
> (ii) 2 weeks' notice after 12 consecutive months of employment;
> (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
> (b) is given a combination of written notice under subsection (3)(a) and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just cause….

42. Section 64 of the *Act* applies to group terminations. Where there is a group termination, and the group includes 50 or more employees, notice of 8, 12, or 16 weeks is required based on the size of the group. Notice is required to be given to each employee, a trade union recognized as a bargaining agent, and the minister:

> 64. (1) If the employment of 50 or more employees at a single location is to be terminated within any 2 month period, the employer must give written notice of group termination to all of the following:
> (a) each employee who will be affected;
> (b) a trade union certified to represent, or recognized by the employer as the bargaining agent of, any affected employees;
> (c) the minister.
>
> (2) The notice of group termination must specify all of the following:
> (a) the number of employees who will be affected;
> (b) the effective date or dates of the termination;
> (c) the reasons for the termination.
>
> (3) The notice of group termination must be given as follows:
> (a) at least 8 weeks before the effective date of the first termination, if 50 to 100 employees will be affected;
> (b) at least 12 weeks before the effective date of the first termination, if 101 to 300 employees will be affected;
> (c) at least 16 weeks before the effective date of the first termination, if 301 or more employees will be affected.
>
> (4) If an employee is not given notice as required by this section, the employer must give the employee termination pay instead of the required notice or a combination of notice and termination pay.
>
> (5) The notice and termination pay requirements of this section are in addition to the employer's liability, if any, to the employee in respect of individual termination under section 63 or under the collective agreement, as the case may be.
>
> (6) This section applies whether the employment is terminated by the employer or by operation of law.
>
> 1995, c. 38, s. 64.; 2002, c. 42, s. 31.

43. With respect to group termination, section 68(2) provides that the termination pay requirements of section 64 "apply whether or not the employee has obtained other employment or has in any other way realized or recovered any money for the notice period":

> 68. (1) A payment made under this Part does not discharge liability for any other payment the employee is entitled to receive under this *Act*.
>
> (2) The termination pay requirements of section 64 apply whether or not the employee has obtained other employment or has in any other way realized or recovered any money for the notice period.
>
> (3) If an employee is not covered by a collective agreement, the director may determine that a payment made to the employee in respect of termination of employment, other than money paid under section 64, discharges, to the extent of the payment, the employer's liability to the employee under section 63.

1995, c. 38, s. 68.

44. The Delegate found that there were terminations of employment such that, absent the application of section 97, the provisions of section 63 and 64 applied.

45. In its reply submission Well-Being argues that there "…was not a termination of employment in the ordinary sense" (page 3, November 6, 2006 Reply). Further the notice to the employees "…was not a termination of their employment at the Nanaimo Seniors Village, but rather notice that the contract for care services was moving to another employer and that, as a result, Well-Being would no longer be the employer".

DEEMED CONTINUOUS EMPLOYMENT, SECTION 97

46. The application of section 97 of the *Act* is at the centre of the dispute between the parties to this appeal. Section 97 provides as follows:

> **Sale of business or assets**
>
> 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. 1995, c. 38, s. 97.

47. This provision has two requirements. The requirements are (1) that (a) all or part of a business or (b) a substantial part of the entire assets of a business is disposed of, and (2) there be employees employed by the business.

48. The Delegate found that the first requirement was met. The termination and re-tendering of a labour contract was found to satisfy the first requirement. Before the Delegate there was an issue taken on this finding, and the issue was again raised by the Respondent Employees in reply but not in their original submissions to the Tribunal.

49. The Delegate found that an employee's employment must be continuing at the time the business or a substantial part of its assets are transferred. In doing so he followed decisions of this Tribunal. The Employment Standards Tribunal has held that if an employee is terminated on or before the disposition of the business section 97 has no application.

50. The Delegate analyzed section 97 in the context of the facts as follows. He found that Well-Being is the employer of the employees until sometime on September 9, 2004 *despite* the Records of Employment that showed terminations on September 8, 2004. It is not disputed that the labour service contract with Well-Being was terminated by the Partnership September 9, 2004 at 6:30am. The labour service contract is part of the "business".

51. If the labour service contract was terminated at 6:30am the employees of Well-being were no longer employed by the business after that date and time. While many former employees of Well-being eventually became employees of CareSource, none became employees of CareSource before 7:00am September 9, 2004. It is unlikely that any became employees of CareSource under the employment contract even at 7:00am September 9, 2004. Their employment was to commence at some mutually agreed upon date. Thus, at the time the business was acquired by CareSource, at 7:00am September 9,

2004, none of the employees of Well-Being were employees of the business, section 97 does not apply, and the employees are owed group termination pay pursuant to section 64.

52. Moreover, even if there was no moment in time when the employees were not either employees of Well-Being or employees of CareSource the legal test for the application of section 97 has not been met since the employees were terminated "on or before" their agreements with CareSource took effect.

DISCUSSION AND ANALYSIS

Standard of Review

53. An appeal to the Employment Standards Tribunal is a limited statutory appeal. Section 112(1) of the *Act* restricts the grounds of appeal:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

54. In such an appeal it is not open to an appellant to appeal factual findings, findings of mixed fact and law, or to introduce new evidence on appeal that was available at the time the determination was made.

55. In a number of decisions of the Employment Standards Tribunal, panels have adopted the definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.). That definition can be paraphrased as finding an error of law where there is:

1. a misinterpretation or misapplication of a section of a statute;

2. a misapplication of an applicable principle of general law;

3. acting without any evidence;

4. acting on a view of the facts which could not reasonably be entertained; and

5. adopting a methodology that is wrong in principle.

56. The weight of evidence is a matter for the Delegate and is a question of fact, not law: *Ahmed v. Assessor of Vancouver* (1992) BCSC 325; *Provincial Assessors of Comox, Cowichan and Nanaimo v. Crown Zellerbach Canada Ltd.* (1963) 42 WWR 449 at page 471. It is only where a conclusion reached is one that could not reasonably be entertained that an error of law is shown: *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.).

57. In considering this issue on appeal it is not necessary that the Tribunal necessarily agree with the conclusion of the Delegate. It is only if no reasonable person, acting judicially and properly instructed as

to the law, could have come to the determination that a successful appeal lies: *Delsom Estates Ltd. v. Assessor of Area 11 – Richmond / Delta* (2000), SC 431 (B.C.S.C.), approved in *Britco Structures Ltd.*, BC EST #D260/03.

58. The Respondents argue that the Delegate did not commit any errors of law, in that the findings of the Delegate are findings of fact, of mixed fact and law, or are all findings that could reasonably be entertained.

Termination of Employment

59. There is an issue between the parties regarding whether there was a termination of employment. As noted above, the Delegate found that the care staff were terminated on or before the disposition of the care services contract to CareSource.

60. In the Appellants' submission, however, issue is taken with whether there was a termination of employment. Of course, if there was no termination of employment then sections 63 and 64 would not apply.

61. The issue is whether, in the circumstances, a reasonable person who received the notice that was given on August 4, 2004, in the context of these facts, would conclude that his or her employment was terminating at a certain point: *Yeager v. R.J. Hastings Agencies Ltd.***,** [1985] 1 W.W.R. 218, 5 C.C.E.L. 266 (B.C.C.A.).

62. The Appellants say "The notice to the Well-Being employees clearly set out that employees would be contacted by the new contractor" and "We say that under the circumstances, there was a further error of law in finding that notice of termination had been provided by Well-Being". The Appellants then cite the decision of the BCSC in *Royster v. 3584747 Canada d/b/a K-Mart*, [2001] BCSC 153, for the proposition that a notice of termination, to be effective, must be specific and unequivocal and clearly communicated to the employee.

63. In *Royster* the employee was employed by Kmart and that company was sold to the Hudson's Bay Company. The employer was continuing its efforts to find employment for the employee within the company prior to the sale. Kirkpatrick, J. (as she then was) quotes from the contents of the letter received by Royster:

> [13] By a letter dated March 2, 1998, which was delivered by hand to Ms. Royster, she was advised that her employment was terminated. The relevant portions of the letter, which is described in bold lettering as "Notice of Termination", read:
>
> > As you are aware on February 6th, 1998 the Hudson's Bay Company announced its intention to acquire Kmart Canada. For legal reasons, we must now give notice in all locations that are either closing or eventually moving to another store format.
> >
> > Therefore, this letter confirms the notice of termination of your employment is given to you as of March 5th, 1998, and provides for notice of sixteen (16) weeks to June 25th, 1998, during which time you will continue as an employee of the Company.
> >
> > During the notice period, the Hudson's Bay Company will make every effort to locate an alternate position for you. We hope to place as many employees as possible within the Company. A job offer would, of course, cancel this notice of termination. However, should

> the Company be unsuccessful in locating suitable alternate employment, you will be provided with severance arrangements, to be detailed separately.

64. The Court also notes the following:

> [24] Counsel for Ms. Royster contends that the notice provided to the plaintiff was equivocal, unclear and ambiguous. In support of that contention, counsel relies, in part, upon the evidence of Ms. Royster at her examination for discovery, where she testified as follows:
>
> Q. 260
>
> Did you take it from that [the notice of termination] that you understood June 25th, 1998 would be your last day at the store?
>
> A.
>
> No, I did not because, as I said, we were told that this would be a letter of termination if our store did not become either a Bay furniture store or we were -- if we were placed within the Bay corporation, Zellers corporation, then this letter would be invalid, so I did not understand as of the 25th I would be unemployed. I understood this could possibly be a letter of termination.

65. The Court then concludes that the notice was effective, but because of its conditional nature, it was only effective from a later date:

> [27] Nevertheless, looking at the words of the notice, it is plain that it is conditional, if for no other reason than its use of the words, "[A] job offer would, of course, cancel this notice of termination." That leaves the unmistakable impression that the notice will be effective only if a job offer from the company did not materialize. Indeed, that was Ms. Royster's interpretation of the meaning of the notice.
>
> [28] The defendant asserts that Ms. Royster clearly understood that the notice meant that her employment with Kmart would be terminated on June 25, 1998. The plaintiff, in her affidavit, stated that the March 2, 1998 letter indicated to her that the Westwood Mall Kmart was to close and that she "was likely to lose" her job.
>
> [29] In these circumstances, I do not think it can be said that the notice of termination was effective from March 5, 1998. The evidence is unclear as to the date by which Kmart made it clear to Ms. Royster that no alternate employment within the company would be found for her. It is clear, however, that by June 4, 1998, Ms. Royster knew that her employment was terminated and that no other employment within Kmart was available to her. I therefore conclude that the notice of termination was effective from that date.

66. In my opinion this case is distinguishable from the case before us here. In *Royster* the employer continued to hold out hope to the employee that her employment could continue *with the employer*. Of course, continued employment with the employer was something wholly within the power of the employer. In such case continued employment with the employer was a real possibility and the termination of her employment was conditional upon other employment with the employer not being available. As stated by the Court "Nevertheless, looking at the words of the notice, it is plain that it is conditional….." (paragraph [27]).

67. Since *Royster* the Court of Appeal has held that the mere possibility of employment with another entity does not abrogate a termination that is otherwise clear and unequivocal: *Gregg v. Freightliner Ltd. (c.o.b. Western Star Trucks)*, 2005 BCCA 349, [2005] B.C.J. No. 1390. Thus, Lowry, J.A., speaking for the

Court, held in a group termination context, albeit not one interpreting the group termination provisions of the *Act*, that:

> [11] I do not consider that either the possibility of employment with a related company in Portland or the possibility that the employment the appellant had with Freightliner in Kelowna might be terminated earlier could have rendered the notice that his employment would end on 30 September 2002 other than clear, unequivocal, and hence effective. There must always be uncertainty about future employment when a manufacturing plant closes, but it cannot be that, having otherwise given valid notice to its employees as to the date when their employment will end, an employer fails to give them effective notice of termination simply because they are told about the possibility of being offered employment elsewhere with a related company (that if accepted would negate the severance provided) and the possibility that events may lead to their employment being terminated sooner than expected.

68. This case is consistent with two earlier determinations of the Court: *Jalbert v. University of British Columbia* (2000), 145 B.C.A.C. 285, 2000 BCCA 552, and *Kalaman v. Singer Valve Co.* (1997), 38 B.C.L.R. (3d) 331, 93 B.C.A.C. 93. The Court in *Gregg* described the issue in the following terms:

> [14] The question in this case must be whether the possibility of continued employment could, in the circumstances, have reasonably caused the appellant and employees like him to consider they had any assurance of continued employment such that they need not be concerned about finding alternative positions. There can have been no such assurance. They were told their employment would end on 30 September 2002. The plant was closing then and only some of the employees of Freightliner were going to be offered employment with its related company in Portland. It was certainly clear that, while the appellant may have hoped that he would be offered an acceptable position at the Portland plant, his employment would be terminated at the end of September 2002.

69. In the subject case Well-Being did not hold out any prospect of continued employment by it. The notice of termination it gave, reinforced by the later memorandum, is unequivocal. Employment with Well-Being would terminate on a specific date at a specific time, September 9 at 7:00am. The Appellant emphasized the assurances the Appellant made to the employees regarding continuity of care. In its submission it says:

> "Employees were advised that the effect of this transition would be that their employment contracts with Well-Being would be terminated. The employees were advised that every effort would be made to attempt to have continuity in care services provided between the contractors, however, Well-Being was not able to guarantee that all employees would be rehired by Bayshore. Continuity of care means the same people doing the same jobs. In its discussions with contractors, the Partnership insisted on a seamless transition between Well-Being and the successful bidder".

70. As can be seen from this restatement by the Appellant, whether the employees would be hired by the new labour services contractor was equivocal. While "Continuity of care means the same people doing the same jobs" at the same time the employees were told that "…Well-Being was not able to guarantee that all employees would be rehired by Bayshore". That equivocation was prophetic. Most were hired but some were not. As the letter confirming termination of August 6, 2004 stated "…we cannot make any assurances on what is going to happen in the future" and "Those decisions are to make by the new contractor".

71. Well-Being issued ROEs. Although these documents are generally issued after the fact, they reflect what actually occurred, namely, the deliberate and calculated termination of the employees' employment with Well-Being.

72. Well-Being argues that the notice was not a notice of termination of the employees' employment at the Nanaimo Seniors Village "…but rather notice that the contract for care services was moving to another employer and that as a result, Well-Being would no longer be the employer" (page 3, reply submission). In my opinion, if the employees were employed by Well-Being at the Nanaimo Seniors Village, as all parties agree that they were, then notice of termination of employment with Well-Being is notice of termination of the employees' employment at the Nanaimo Seniors Village.

73. The Appellants also raise the fact that CareSource has acknowledged that prior service with Well-Being is being honoured.

74. First, I note that there is nothing in the contracts of employment with CareSource that states such is to be the case. In other words, it was not a term of employment contemplated at the time the contracts were written, or at least, was not considered important enough to be reduced to writing.

75. Second, the Contract Service Providers Agreement between the Appellant Partnership and CareSource, which was apparently produced well after the fact, does not include any provision reflecting continuation of employment, and includes a provision that "This Agreement constitutes the entire agreement between the parties and may only be amended in writing".

76. Third, the correspondence that was submitted as evidence of this fact, was submitted well after these issues commenced and those comments directly contradict the earlier evidence obtained by the Delegate during the investigation.

77. Fourth, in my opinion, whether or not CareSource acknowledges this as a term or condition of employment, is not directly germane to the issue.

78. The issue is not whether CareSource has agreed to a term or condition of employment that recognizes prior service, or accepts that section 97 applies, but whether the notices of termination were effective and met the appropriate standard: whether the possibility of continued employment could, in the circumstances, have reasonably caused the employees to consider they had an assurance of continued employment such that they need not be concerned about finding alternative positions.

79. In this regard the Delegate accepted the evidence of Carol Crow, the Human Resources Manager, that "the letters of August 4, 2004 and the memo of August 6, 2004, were intended to give the employees four weeks written notice of termination so their employment with Well-Being would end at 7:00am September 9, 2004". As the Delegate found "There would be no purpose issuing the August 4, 5 & 6 letters and memos if it was not to terminate the employees" (page 25, Determination).

80. The Delegate concluded that the employment of the employees was terminated on or before 7:00am September 9, 2004. Even if I disagreed with his conclusion, which I do not, in my opinion the Delegate did not err in law in his interpretation of what constituted a termination, nor was his conclusion one that could not reasonably be entertained, within the meaning of the tests enunciated in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.).

The Effects of Disposition at Common Law

81. At common law the sale or disposition of a business has various legal consequences for the employees. These consequences were accurately described by Lander, J., in *Helping Hands Agency v. Director of Employment Standards* No. SO11194, New Westminster Registry, April 19, 1994 as follows:

> I start with the proposition that, at common law, where a business is sold, and there is a change in the legal identity of the employer, there is no automatic transfer of the contracts of employment. In the case of ***Addison*** v. ***M. Loeb, Ltd.*** (1986), 25 D.L.R. (4th) 151 (Ont. C.A.), Dubin J.A., in the context of a wrongful dismissal action, wrote the following at p. 152:
>
> > "At common law, since a contract of personal services cannot be assigned to a new employer without the consent of the parties, the sale of a business, if it results in the change of the legal identity of the employer, constitutes a constructive termination of the employment.
>
> As was pointed out by Steele J. [the learned trial judge] ... that proposition is accurately set forth in ***White*** v. ***Stenson Holdings Ltd.***; ***David Thompson Motor Inn Ltd. et al.*** (third parties) (1983), 22 B.C.L.R. 25 at p. 30, 43 B.C.L.R. 340, [by Locke J.] as follows:
>
> > 'In principle, as we deal with a contract of employment for personal service, such contracts cannot be assigned without the consent of the parties. Where a business is sold as a going concern, the law is stated in ***Collier*** v. ***Sunday Referee Publishing Co.***, [1940] 2 K.B. 647, where Asquith J. held that where the defendant sold a newspaper and put it out of its power to further employ the plaintiff, it destroyed the position to which they had appointed the plaintiff and committed a breach of contract for which it was liable to pay damages.'
>
> If the employee is offered and accepts employment by his new employer, a new contract is entered into. The consequences to an employee in such circumstances are, I think, fairly set forth in an article by M. Norman Grossman in 5 Advocates' Quarterly 500 (1984-85) at p. 502, as follows:
>
> > 'Once the employee accepts employment with the new employer, thereby establishing a new contract, he will probably "mitigate himself right out of his cause of action" against his former employer. If he fails to accept the new job and it is in all respects fundamentally the same as his old one, he is likely precluded by the doctrine of mitigation from recovering any loss sustained on the constructive termination on the basis that such loss could reasonably have been avoided. The unfortunate employee is caught in a bind and will inevitably suffer at least the loss of his perhaps lengthy service with the former employer. If, on the other hand, the new employer declines to employ the individual, the termination becomes express rather than constructive and the former employer will remain liable for any properly recoverable damage sustained by the employee.'"

82. The *Act*, in certain circumstances, alters the common law. Section 97 governs the relationship on disposition and alters the common law.

Section 97 and Common Law

83. When interpreting section 97 of the *Act*, this Tribunal and the Courts have specifically noted that the *Act* should be given a broad and purposive meaning.

84. Lander, J.'s decision in *Helping Hands* was appealed to the Court of Appeal. The Court of Appeal accepted the description of the common law in the court below. It should be noted that section 97 of the current *Act* was formerly section 96 of the pre 1995 *Act*. The Court approached the interpretation of the

Act and section 97 (then section 96) from a different perspective. In *Helping Hands Agency v. Director of Employment Standards* (1995), 15 BCLR (3d) 27 (BCCA), Legg, J.A., for the Court, opined:

> 17 When the full context of the ***ESA*** is examined it is clear that a major purpose of the legislation is to give protection to employees for the payment of their wages. Part 2, which is entitled Wage Protection, contains sections which were enacted for that purpose. This part includes sections which state when wages are to be paid, the duty upon an employer when an employee's employment terminates and the duty to keep records of wages earned and provides that an industrial relations officer or an employment standards officer may issue an order against an employer to pay wages of an employee. The Director of Employment Standards is given powers to enforce the obligations to pay wages against an employer. Part 4 provides for annual vacations and directs that an employer shall pay annual vacation pay to an employee. Parts 5 and 5.1 deal with an employee's rights on termination of employment. Part 7 deals with maternity and parental leave, and Part 8 with employee protection. Section 96 is contained in Part 13 which is a general part and includes a section which creates offenses for breaches of the provisions of the ***ESA***.
>
> 18 From my reading of the ***ESA*** as a whole I conclude 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.
>
> 19 I approach the interpretation of s. 96 with that context in mind.

85. In *Helping Hands*, the Court below had found that the purchaser of a seniors' care home business was not responsible for the payment of accrued vacation pay. The vendor, Caring Hearts, had sold the business to the purchaser Helping Hands. Caring Hearts did not terminate the employment of the employees. Some of the Caring Hearts employees continued to be employed after the sale by Helping Hands. One of those employees filed a complaint for unpaid vacation pay.

86. The Director found that Helping Hands was liable for vacation pay. Helping Hands appealed successfully to the BC Supreme Court but on appeal to the Court of Appeal the original decision of the Director was reinstated.

87. In coming to its conclusion the Court of Appeal followed the Ontario cases of ***Addison v. M. Loeb Ltd.*** (1986), 25 D.L.R. (4th) 151 (Ont. C.A.); ***Small v. Equitable Management Ltd.*** (1990), 33 C.C.E.L. 114 (Ont. Div.Ct.) and distinguished a decision of the Alberta Court of Appeal in ***Act Computer Services Ltd. v. Miller*** (1990), 29 C.C.E.L. 1., finding it inconsistent with the approach taken by the Supreme Court of Canada in ***Machtinger v. HOJ Industries Ltd.*** (1992), 91 D.L.R. (4th) 491 (S.C.C.). In ***Machtinger*** Mr. Justice Iacobucci, writing for the majority, at 507, interpreted the *Employment Standards Act*, R.S.O. 1980, c. 137 by giving it a fair, large and liberal construction and interpretation.

Section 97 Disposition

88. Section 97 requires, as a first condition, that there is a disposition of the business. The condition is described as follows: "If all or part of a business or a substantial part of the entire assets of a business is disposed of…." So there must first be a disposition.

89. The parties before the Delegate argued the question of whether there had been a disposition of the business such that section 97 could have application. The Delegate, found against the employees on this

issue, holding that, in effect, the termination of a labour supply contract and the successful re-tendering of such contract was a disposition within the meaning of section 97.

90. In coming to this conclusion the Delegate was influenced by the decision of this Tribunal in *Gill*, BCEST #D544/00 and the reconsideration in BCEST #RD040/02. In *Gill* the Tribunal found that the employment of the complainant was continuous and uninterrupted through a change in labour supply contractors when a new contractor "took over" the contract to employ labourers at a saw mill. As this issue has not been challenged in any of the submissions before me, I will assume that the termination of one labour supply contract and the re-tendering of a labour supply contract to a third party is a disposition of part of the business sufficient to meet the first requirement of section 97.

Application of Section 97

91. There are competing interpretations of section 97 advanced by the parties. The Appellants in their submissions assert that if there is continuing employment with the purchaser of the business that is sufficient to invoke section 97. The Appellants also argue that if there is a seamless transition to reemployment with the purchaser that is sufficient to invoke section 97. The Respondents say that section 97 is not invoked if there is a termination of employment on or before the disposition.

92. Following ***Helping Hands*** this Tribunal considered section 97 in its reconsideration decision in *Lari Mitchell*, BCEST #D107/98. The factual background in *Mitchell* was described by the panel 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.
>
> *[pg.3 of RD107/98]*

93. On appeal to this Tribunal the issue in the first instance was whether the Delegate erred in his interpretation of section 97. The Tribunal's key conclusions were as follows:

> ... 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)
>
> *[pg. 6-7 of RD#107/98]*

94. Upon reconsideration, the panel concluded as follows:

> 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.
>
> *[pg. 24 of RD#107/98]*

95. The parties all made submissions regarding the application of the *Mitchell* decision. None of them took issue with this passage. Of particular note is the following qualification contained in the statement of the Tribunal:

> *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.

96. This qualification in the context of *Mitchell* must be considered *obiter dicta* since none of the BC Systems employees were purported to be terminated by the employer who sought to "transfer" the employees to employment with the provincial government.

97. On the other hand, counsel for Well-Being finds comfort in the following passage from *Mitchell*, arguing that the Delegate wrongly accepted this argument that was rejected by the Tribunal in *Mitchell*:

> Taken to its logical conclusion, the argument of the excluded employees means that an employee could refuse superior conditions 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.

98. The decision of the reconsideration panel in *Mitchell* was upheld and found to be correct in *Lari Mitchell et al. v. B.C. (Employment Standards Tribunal)* (1998), 62 B.C.L.R. (3d) 79 (B.C.S.C.).

99. The parties also reviewed the decision of this Tribunal in *Gill*, BCEST #D544/00 (upheld on reconsideration, BCEST #RD40/02). In *Gill* the Tribunal analyzed section 97 as follows:

> *Section 97: Sale of Business or Assets*
>
> In interpreting section 97, one must remain cognizant of the fact that employment standards legislation in general, and this provision in particular, must be given such fair, large and liberal construction as best insures the attainment of its objects--see *Machtinger v. HOJ Industries* Ltd.[1992] 1 S.C.R. 986; *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27; *Helping Hands Agency Ltd. v. B.C. Director of Employment Standards* (1995), 15 B.C.L.R. (3d) 217 (B.C.C.A.)
>
> The purpose of section 97 of the *Act* is to preserve the employment status of employees when their employer's business (or their employer's business assets) is sold or otherwise transferred ("disposed of") to a third party. This provision is sometimes referred to as a "successorship" provision in that it creates certain ongoing employment rights and entitlements for employees who continue to work for the subsequent or "successor" employer following the sale of the business or a substantial part of the business assets.
>
> Section 97 is triggered when the individual in question is an "employee of the business" on the date of the disposition. The disposition itself does not terminate the employment relationship; the employment relationship merely continues with the successor employer being, in effect, substituted for the previous employer as the employer of record. This is not to say that the new employer *must* continue to employ all of the employees of the former employer. However, unless appropriate arrangements are made so that the employment of such persons is terminated on or before the disposition is completed, those employees continue on as employees of the new employer and retain all of their accrued rights and entitlements (including service-based benefits), but only insofar as the *Act* is concerned, vis-à-vis the new employer--see *Helping Hands Agency Ltd. v. B.C. Director of Employment Standards* (1995), 15 B.C.L.R. (3d) 217 (B.C.C.A.).

100. In this decision the Tribunal reiterated the position noted in *Mitchell* that termination prior to completion of the disposition was an exception to the principle. However in *Gill* as in *Mitchell* the statement in the qualifying clause that "unless appropriate arrangements are made so that the employment of such persons is terminated on or before the disposition is completed" is, in my view, again *obiter dicta*.

101. The circumstances in *Gill* were that a labour supply contract between a lumber company and the original labour supply contractor was terminated. A new contract was awarded to another labour supply contractor. No notice of termination was given to the employees who simply continued with the new labour supply contractor. An employee filed a complaint. The Delegate calculated the liability of the employer from the date the new labour supply contractor commenced. On appeal to the Tribunal it was held that section 97 applied and that entitlements should be calculated from the date of hire with the original labour supply contractor.

102. There are other decisions of this Tribunal that use the same language and legal test as that enunciated in *Gill* and *Mitchell*. In *Re Primadonna Ristorante Italiano*, BC EST #RD046/01 (Reconsideration of BC EST #D466/99), the Tribunal affirmed the position that the operation of section 97 is contingent on there being both a disposition and employment with the 'vendor' at the time of disposition. If an employee is terminated in accordance with the requirements of the *Act* on or before the disposition, section 97 is not applicable. The facts are summarized by the Tribunal as follows:

> The Valorosos purchased the restaurant from O'Donals Restaurants of Canada Ltd. (O'Donals) with the sale completing on May 27, 1997. By letter dated May 1, 1997 [from O'Donals] the employees were informed that the restaurant had been sold and that the Valorosos would take

> possession of the restaurant on May 21, 1997. The employees were furthermore advised that O'Donals would pay all employees up to and including May 21, 1997, including holiday pay.
>
> The letter furthermore stated: "This letter is our notice of termination to all employees, that May 21, 1997 will be the last day of employment with O'Donals Restaurants of Canada Ltd." The letter furthermore stated that the Valorosos would interview employees for consideration of future employment….
>
> On May 21, 1997, O'Donals Restaurants issued Records of Employment to Revesz and Smith stating that the reason for termination was that the "store closed".
>
> Prior to the Valorosos taking over, they interviewed Revesz and Smith who wished to stay and hired them with their first day of employment being May 24, 1997.

103. In *Primadonna* there was a gap in employment. Further, the disposition of the business took place some three days before the employees commenced employment with the purchaser. The decision and test in *Primadonna* was approved in *Harlan*, BC EST # D204/02 although the *Harlan* case only required that the matter be remitted back to the Delegate to consider the issues regarding section 97.

104. In coming to its conclusion in *Primadonna* the Tribunal relied on the decision of Vickers, J., in *Lari Mitchell et al. v. B.C. (Employment Standards Tribunal)* (1998), 62 B.C.L.R. (3d) 79 (B.C.S.C.).

105. The Appellants in their submissions to the Delegate argued that where the employment of the employees continues uninterrupted following the disposition of all or part of the business, section 97 takes effect, and the provision of notice is irrelevant so long as the employment of the employees continues. This is how they seek to characterize the transition from Well-Being to CareSource.

106. In *Re Columbia Recycle Ltd.*, BC EST #D070/96 the complainant was provided with notice that his last day of work would be May 19, 1995. On May 1, 1995 the business was purchased by the new owner. The sales agreement provided that the Vendor would be responsible for any liabilities with respect to its employees prior to May 1, 1995. On May 3, 1995 the employee received an ROE indicating that his last day of employment with the Vendor was May 2, 1995. The complainant then commenced employment with the purchaser on May 3, 1995 without interruption. In applying section 97 the Tribunal found that the notice of termination was of no effect since the employment continued after the notice period ended. Thus, section 97 applied and the purchaser was required to honour accrued rights.

107. There are some Tribunal decisions that have apparently confirmed that the provision of notice of termination or the issuance of an ROE has no effect on the application of section 97 as long as employment continues. For example, in *510321 BC Ltd. Special Screencraft Printers Ltd.*, BC EST #D014/97 the Adjudicator found as follows:

> The issue before me in this appeal is whether Special Screencraft Printers Ltd. is solely responsible for the payment of compensation to Mr. Mound. Applying the Court of Appeal's reasoning in **Helping Hands** and the adjudicators reasoning in **Columbia Recycle** I find that Special Screencraft Printers Ltd. is responsible for compensation for length of service and vacation pay as set out in Determination No. CDET 004370. The preconditions to the operation of Section 97 have been met in that there was a sale of assets of a business and Mr. Mound was employed by the purchaser continuously without interruption by the sale. Once he began work for the purchasing employer he was entitled to compensation or notice in lieu of compensation based on the original starting date with the previous owner or owners. Mr. Mound has accrued continuous employment from January 30, 1990 to May 15, 1996 therefore he is entitled to compensation set out in the Determination.

108. The Appellants also cite *Re Kim*, BC EST #D367/97.

109. I have reviewed *Special Screencraft Painters* and *Kim* and am unable to determine whether the employment of the employees was terminated by the vendor on or before the sale of the business. The *Kim* decision makes it clear that notice was given but there is no indication of whether, as in *Columbia Recycle*, the employment commenced before expiration of the notice.

110. There are other cases of the Tribunal that deal with situations where there is a break in service. This is how the Respondent and Director seek to characterize the events. In *Re Temko Industrial Design Ltd. dba Budget Brake & Muffler*, BCEST #D170/03 there was a break in service of two days, with the complainant being terminated by the vendor two days before his employment commenced with the purchaser. Several months later he was terminated by the purchaser and the issue was whether he could count service with the vendor in determining statutory entitlements. The Tribunal found that the Delegate had erred in applying section 97 in such circumstances and that only the length of service with the purchaser could be considered.

111. A case that is on point with the issue before the Delegate is the decision of the Tribunal in *Body Rays Tanning Centre*, BC EST # D041/03. In this case, the complainant commenced employment with the disposing employer in 1999. The business was sold on March 28, 2002. The complainant was given notice that his employment terminated on March 28, 2002. The complainant was offered employment and commenced employment with the purchaser "sometime between March 28 and April 2". Following the obiter in *Gill* and *Primadonna* the Tribunal found that "If an employee is terminated on or before the disposition, section 97 is not applicable".

112. Whatever else might be said, the interpretation referenced in the *Mitchell*, *Gill*, *Primadonna*, and *Body Rays* line of authority creates certainty in the disposition of a business. It directs employees where to look in the event of these employment changes. Prospective vendors and purchasers know that either the vendor must give section 63 and 64 notice and/or termination pay to its employees and terminate them on or prior to the disposition, in which case the vendor is responsible for all obligations under the *Act*, or there is no termination of employees on or prior to the disposition and the purchaser assumes accrued obligations under the *Act* by operation of section 97. Vendors and purchasers, then, will take this into account in determining the price they will accept or pay.

113. Another argument advanced by the Appellants is that the Determination of the Delegate creates a "windfall" for the employees at the expense of the Appellant. Certainly the result of the decision for the employees that were hired by and accepted employment with CareSource results in substantial payments to them in lieu of statutory notice. For the employees that lost their positions there is no such result. As the notices made clear with respect to their future employment, "that decision is ultimately up to the new contractor" and "we cannot make any assurances on what is going to happen in the future".

114. Moreover, the *Act* does not calculate notice of group termination based on years of service. It is based solely on the number of employees involved in the group termination. The *Act* further specifically contemplates the situation where new employment is obtained, and provides that such cannot be considered:

> 68. (1) A payment made under this Part does not discharge liability for any other payment the employee is entitled to receive under this Act.

(2) **The termination pay requirements of section 64 apply whether or not the employee has obtained other employment or has in any other way realized or recovered any money for the notice period**.

115. In any event, whether an interpretation produces a benefit to an employee in any given case is not obvious without the benefit of hindsight. A vendor or purchaser may be or become insolvent and the apparent benefit from the application of section 97 may be entirely illusory.

116. The *Mitchell*, *Gill*, *Primadonna*, and *Body Rays* line of authority in my opinion strikes a balance between the property rights of vendors and purchasers and the interests of employees under the *Act*. It does not saddle with purchasers in all cases the statutory obligations that would otherwise accrue to the employees it hires, and thus does not impede or place additional burdens on commerce. This line of authority does not require an interruption in employment which in some contexts, including the health care industry, is impractical if not dangerous or contrary to law. It allows the parties to this kind of transaction, the termination and re-tendering of a labour supply contract, which seemingly had a labour relations and/or financial or business purpose of benefit to the Appellants, to structure it in a way with known and certain consequences.

117. In a case such as the present case, it allows a purchaser to pick and choose which employees it might hire. This result follows, however, at a cost to the vendor, but it is a known cost that can be abrogated with appropriate statutory notice. In such case the employees have the benefit of the protection of the *Act*, by receiving statutory notice or payment in lieu of such notice, but the parties to the transaction can give effect to their own business purposes.

Casual Employees

118. Section 65(1)(a) restricts the application of sections 63 and 64 of the *Act*. Section 65(1) provides as follows:

> 65. (1) Sections 63 and 64 do not apply to an employee
>
> (a) employed under an arrangement by which
>
> (i) the employer may request the employee to come to work at any time for a temporary period, and
>
> (ii) the employee has the option of accepting or rejecting one or more of the temporary periods,
>
> (b) employed for a definite term,
>
> (c) employed for specific work to be completed in a period of up to 12 months,
>
> (d) employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the Bank Act (Canada) or a proceeding under an insolvency Act,
>
> (e) employed at one or more construction sites by an employer whose principal business is construction, or
>
> (f) who has been offered and has refused reasonable alternative employment by the employer.

119. In this case the parties have made extensive submissions to this Tribunal on the issue of the application of section 63 and 64 to the casual employees. In reviewing those submissions I do not perceive there to be

any significant factual issues. For example, in the reply submission of the Appellants dated November 6, 2006, they describe the issue thus:

> The casual employees who worked at the Facility were well aware of their status. The fact that seniority is used for calling in casual employees does not change the nature of their positions. There was an arrangement between the casual employees and the Applicants that allowed the Applicants to call the casual employees to work at any time for temporary periods and the employees could accept or reject the temporary work without risk to their continued employment…..

120. While there are different perspectives on the relevance of advancement from a casual to a regular employment the underlying facts are not in issue. For example, the Appellants in their reply submission note the following:

> The Represented Complainants say that seniority is used as a basis for determining whether a casual employee may become a full-time employee. That is not the case. Casuals in fact may only obtain a full-time permanent position by applying for a vacancy. How an employee becomes full time is irrelevant to the determination of the casual status for the purpose of section 64. Casual employees are called in on an as-needed, temporary basis at the Facility and they may decline a shift without repercussion. The Delegate erred in applying the appropriate test and in considering additional irrelevant factors such as the manner in which a casual employee becomes a permanent employee.

121. There is no dispute, for example, that the Well-Being Handbook provides that seniority is a factor in awarding vacant positions. Since casuals accumulate seniority, that seniority counts when they apply for a vacant full-time or part time position. The position of the Appellants is not to dispute this finding, but simply asserts that it is not germane to the issue before the Delegate.

122. With respect to the employee and employer expectations, the Delegate found as follows (page 30-31):

> They did not work for periods of either uncertain or fixed duration with no prospects past that period nor was this temporary work without expectation of further employment. The employer counted on them being available for individual shifts, blocks of shifts and longer term relief work and longer term-relief work and the employees counted on and expected to be called in for future work. The seniority system guaranteed many of these employees future work. My review of the payroll records from pay periods approaching September 9, 2004, reflects that a large number of these casuals worked in each pay period and the employer routinely relied on that pool of casuals to staff the facility (emphasis in original).

123. The Appellants submitted as follows:

> The Represented Complainants submit that the casual employees had an expectation of continued employment and that the Applicants must also have had the same expectation. They support this submission by the fact that the Applicants value the continuity of care in the facility and that this is the rationale for providing continuing employment for casuals (Represented Complainants' Response, para 67).
>
> The Applicants submit that <u>all</u> sensible employers wish to utilize employees, even temporary employees, who know the business and its customers. This does not alter the fact that (a) casuals maybe called in to work a shift or shifts at any time and (b) that the casuals can accept or reject the offered employment. Those are the only criteria in section 65(1)(a), and they are met in this case.

124. The Appellants note further (page 7, reply submission):

> The Applicants submit that the Delegate erred in applying the test under section 65 by wrongly considering seniority as it applied to calling-in casual employees and to obtaining full time employment. The Delegate considered more than was necessary under the test and as such, in the Appellant's respectful submission, erred in applying the test. The Applicants therefore ask that the Determination relating to casual employees be set aside for the Delegate's failure to properly apply the legal test.

125. On reviewing the submissions of the parties I also note that none of the parties take issue with the four part test for the application of section 65(1)(a) set forth in *Middleton*, BC EST#D321/99.

126. With respect to the casual employees the Delegate found that they were not excluded from the protection of sections 63 and 64 by section 65(1)(a). The Delegate, however, did not have the benefit of submissions on this point since after releasing his preliminary findings no one took issue with this aspect of his preliminary findings.

127. Much of the Respondents submission address whether the Delegate's finding was a finding of fact or mixed fact and law, or a finding of law. Even if the finding was one of fact or mixed fact and law, this does not address the natural justice issues. In my opinion, the Delegate erred in law by failing to advise the parties that the question of the casual employees' entitlement was a live issue before him. Had he done so, the Delegate would have received the parties' further submissions on that issue, and addressed those submissions in his Determination.

128. I have considered whether, in these circumstances, it is appropriate for this Tribunal to invoke section 110 of the *Act*:

> 110.(1) The tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal or reconsideration under Parts 12 and 13 and to make any order permitted to be made.

129. I am also cognizant of the purposes of the *Act*:

> 2. The purposes of this Act are as follows:
>
> (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
>
> (b) to promote the fair treatment of employees and employers;
>
> (c) to encourage open communication between employers and employees;
>
> (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
>
> (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;
>
> (f) to contribute in assisting employees to meet work and family responsibilities.
>
> 1995, c. 38, s. 2.

130. In this regard I particularly note the purpose of providing "fair and efficient procedures for resolving disputes over the application and interpretation" of the *Act*. In my opinion, in this case, where the

primary facts are not in dispute, it would be neither fair nor efficient to remit this matter for reconsideration to the Delegate. Moreover, it would be a difficult matter both for the Delegate and for the appearance of justice to the parties, *in this proceeding* for the Delegate to reconsider a matter on which he had already rendered a decision.

131. The parties discussed a number of decisions of this Tribunal on the application of section 65 in their submissions before me which it will be useful to review.

132. The Respondents referred to the test for the application of section 65 set forth in *Covert Farms Ltd.*, BC EST #D077/99. The Tribunal in that decision noted that because section 65 is a limiting provision, its application should be narrowly construed:

> Paragraph 65(1)(a) does not apply to Grenier's employment. Section 65 establishes several exceptions to length of service compensation and, like other provisions of the *Act* that limit or remove minimum statutory rights and benefits, its application will be narrowly construed. In paragraph 65(1)(a), there are four conditions that must be established in order to come within the exception: first, that there is an "arrangement" between the employer and the employee; second, that the "arrangement" allows the employer to call the employee to work "at any time" for temporary periods; third, that the employee may accept or reject any temporary period of work; and fourth, that the employee may reject the temporary period without risk to his or her continued employment.

133. I adopt both the approach of the Tribunal in that case and the test that it applied. The decision itself is not helpful on the facts, dealing with a farm labourer housed in accommodations provided by the employer.

134. In this case it is clear that the first three conditions that are required to be established under section 65(1)(a) are met. There was an arrangement between the employer and the casual employees. The arrangement allows the employer to call the employees to work at any time for temporary periods. The employees may accept or reject any temporary period of work. The question arises as to the fourth requirement, whether the employee may reject working the temporary period "without risk to his or her continued employment".

135. In *Brian French*, BC EST #D189/01 the employer asserted that section 65 should apply. The Delegate applied section 65 to excuse the employer. The evidence, however, showed that French, a taxi driver, had three regularly scheduled shifts for many years and the employment relationship was permanent and not temporary.

136. The Respondents also refer to the decision of the Tribunal in *Skeena Project Services Ltd.*, BC EST #D179/01. In that case the Tribunal confirmed that section 65(1)(a) did not apply to a permanent employee subject to seasonal layoff, who took up on call work with another employer during such layoff.

137. The Respondents also rely on *Middleton*, BC EST #D321/99. In that case the Tribunal considered the exemption that applied to the construction industry, section 65(1)(e). I agree with the observations of the Tribunal in that case that:

> …Construction, in particular, is characterized by the fact that workers are generally hired for a single project and are let go when their role in that project is complete. They simply do not expect to work permanently for one employer. They know the nature of their employment and take it for granted that they must be prepared to move not only from site to site but also from employer to employer. There is nothing in the Determination or the material to show that Middleton's

> employment was fixed by the duration of any particular construction project or was grounded in the characteristics of construction employment.

138. In this case, in considering the application of section 65(1)(a) I am particularly cognizant of the findings of the Delegate. I would draw inferences from those findings, which are not in dispute, in the following way.

139. First, in my opinion the Delegate's findings establish that there was an "arrangement" between the employer and the casual employees. In my opinion, the term "arrangement" means that there was an understanding or established relationship between the employer and the employee. There was such between the employer and the casual employees. That arrangement was that employer had work for casual employees to deal with vacation relief, WCB, maternity or sickness relief. The casual employees were qualified and might be available for such work. It follows that the first requirement of section 65(1)(a) as described in *Covert Farms* applies.

140. The second requirement from *Covert Farms* is that the employer might call upon the casual employees for work "at any time". It is clear that the requirement for casual call in staff fluctuates with the need for vacation relief, WCB, maternity and sickness relief. The Delegate had evidence that casuals were called when other staff "called in sick or booked off work". Another employee advised that she might be called "at any time of the day". Another casual "took last minute calls". The nature of this work was to fill in for the absence of others, both scheduled and unscheduled absences. The availability of some of such work was inherently unpredictable, namely, WCB and sickness relief. In my opinion, all such work is for temporary periods and calls for such work could be made at any time.

141. The third requirement from *Covert Farms* is that the employees might accept or reject such work. Virtually all of the employees whose evidence the Delegate cites confirmed that casual employees could turn down a call to work.

142. The fourth requirement from *Covert Farms* is that the casual employees might accept or reject such work "without risk to his or her continued employment". Again, virtually all of the employees whose evidence the Delegate cites confirmed that while there was a seniority list for casual employees there was no penalty for turning down work. There was no risk to "continued employment".

143. In my opinion on these facts the requirements of section 65(1)(a) were met. There was an arrangement, the arrangement allowed the employer to call in the employees for temporary periods, the employees could decline to accept the offered work, and if they did so, there was no risk to their continued employment.

144. The Delegate in analyzing section 65(1)(a) came to a different conclusion. He found that section 65(1)(a) did not apply to "employees who are on a fluctuating work schedule but have an expectation of continued employment".

145. In my respectful opinion there is no basis in either the Tribunal decisions or the terms of section 65(1)(a) to preclude the application of section 65(1)(a) because there "is an expectation of continued employment".

146. The provisions of section 65(1)(a) contemplate that there is an expectation of continued employment. If that were not so, then why would the application of section 65(1)(a) require that there be an "arrangement" between employer and employee? The section does not contemplate a new arrangement

each time an offer of temporary employment is made. It contemplates an ongoing arrangement between the employer and the employee. The fact that the section contemplates an "arrangement" entails, in my opinion, some continuing relationship.

147. I am reinforced in this view by the other terms of the section itself. The section requires that the employee "has the option of accepting or rejecting one or more of the temporary periods". Whether an employee has such an "option" only makes sense in the context of there being a continuing relationship. Further, the option is discussed in the context of "one or more temporary periods", so the section contemplates there being a series of offers of employment, any of which the employee may reject. That is the required nature of the arrangement.

148. It follows that the Determination of the Delegate on the issue of the casual employees is set aside.

Breach of Natural Justice

149. With respect to the Delegate's decision on casuals I have found there to be a breach of natural justice, but in any event have required that the decision on that issue be reversed. That breach arose through the Delegate's reversal of his position on an issue without providing notice to the parties such that the question of the entitlement of the casuals remained a live issue. In my opinion, that issue is easily severable from the balance of the issues before the Delegate.

150. With respect to the balance of the Determination, I note that the Delegate interviewed various employees including both managers and regular employees. The Delegate made inquiries of third parties and provided the parties and their counsel with an opportunity to make submissions to him. The Delegate made extensive preliminary findings and provided the parties with an opportunity to make submissions on those preliminary findings. The parties made written submissions through counsel on the preliminary findings where they were adverse.

151. Section 77 of the *Act* sets out the statutory requirement of procedural fairness that the Director must meet when investigating a complaints under the *Act*. It reads as follows:

> 77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond. 1995, c. 38, s. 77.

152. In these circumstances, except with respect to the casual employees, I am not persuaded that the Delegate failed to give the Appellants an opportunity to know and meet the case against them.

153. The Appellant raises as concerns that (1) the Employer did not receive the employee complaint forms, (2) the Delegate did not pursue the investigation through an individual employee, (3) the Employer did not receive the self-help kits, and (4) that persons from CareSource were interviewed prior to the preliminary findings being issued.

154. In my opinion there is no merit to these concerns. With respect to the complaint forms and self-help kits, there are provisions in the *Act* that permit the Director to keep complaints confidential and to conduct an investigation without even a complaint being filed (sections 75, 76). The Tribunal has held that it is not necessary that these documents be actually produced but it is only required that the parties be informed of the issues and be given a meaningful opportunity respond.

155. In any event, in this case the Delegate disclosed to the Appellants the letters of complaint from legal counsel representing the complainants (page 7, Determination). Those letters of complaint set out the general issues before the Delegate. Counsel for the Appellants made a submission on those complaints.

156. In response to counsel's letters of complaint, the Appellants filed a submission with the Delegate. The submission in a letter dated March 18, 2005 contained 54 paragraphs and was thirteen pages in length.

157. Moreover, the preliminary findings of the Delegate were included in letters to the parties dated June 21, 2005, a thirteen page letter which, as was stated, was "an examination of some of the background and a review of the facts". The Delegate noted that "it sets out my preliminary findings and makes a proposal for settlement". It also invited a response to the "information or proposal".

158. The letter of June 21, 2005 attracted a written response from both parties through their legal counsel. Counsel for the Appellants filed a letter dated July 15, 2005 and a further letter dated August 2, 2005. Counsel for the Respondents filed a letter dated August 4, 2005. Counsel for the Appellants responded by correspondence dated August 12, 2005. Counsel for CareSource even filed submissions concerning the preliminary findings. In response to a request for some documents the Appellants included a further submission which was read by the Delegate but considered not to add to the submissions and information already received.

159. In my opinion, the opportunity to make these submissions and the making of these submissions ensured that both parties were aware of the facts and circumstances relating to the complaints and were given a reasonable opportunity to respond to the issues and evidence before the Delegate.

Oral Hearing

160. I have considered the Appellants request for an oral hearing in this appeal. In my opinion an oral hearing is unnecessary. With respect to the major issues in the appeal, the application of section 97 to the facts and circumstance here, and the treatment an oral hearing is not of assistance given the full, careful and able submissions of counsel, for which I thank them all.

161. With respect to the issue of casual employees, the circumstances were not as to require an oral hearing as I found that the facts and circumstances necessary for the decision were before me in any event.

Calculations

162. The calculation of the entitlements of the various employees is incorrect since the number of employees entitled to group termination pay now excludes casual employees and therefore will be less by virtue of the scale applicable to different numbers of employees inherent in section 64. The calculation of interest is also incorrect since the amounts awarded will be less by virtue of the scale applicable to different numbers of employees inherent in section 64.

163. With respect to issue of what is the appropriate rate of entitlement for vacation pay, I agree with the Delegate and the submissions of the Director and the Respondents that the entitlements should be based on the contract amounts and not the lesser statutory rates: *Creative Screen Arts Ltd.*, BC EST #D024/98, *Trader of Software Corporation*, BC EST #D267/97, *Kamloops Golf and Country Club Limited*, BC EST #RD236/02, BC EST #D278/01 & RD554/01, *Kamloops Golf and Country Club Ltd. v. BC (Director of*

Employment Standards), 2002 BCSC 1324, *Total Care Technologies Inc. and Total Care Holdings Inc.*, BC EST #D441/02.

164. With respect to interest, the provisions of section 88 govern the application of interest to the amounts of unpaid wages or other amounts that the Director determines are owed. The relevant portion of section 88(1) provides:

> 88. (1) If an employer fails to pay wages or another amount to an employee, the employer must pay interest at the prescribed rate on the wages or other amount from the earlier of
>
> (a) the date the employment terminates, and
>
> (b) the date a complaint about the wages or other amount is delivered to the director to the date of payment.

165. The interest rate to be applied is prescribed in section 25 of the *Employment Standards Regulation*, B.C. Reg. 396/95:

> 25. During each successive 3 month period beginning on October 1, January 1, April 1 and July 1, the interest rate payable under section 88(1) of the Act is equal to the prime lending rate on the 15th day of the month immediately preceding the 3 month period. B.C. Reg. 359/99, s. (a).

On Leave Employees

166. There is a further issue regarding employees that were on leave at the time the termination notices were issued.

167. The position of the Appellants is that such employees could not have been properly terminated because they were on leave at the time these events took place. The Appellants rely on section 67(1) of the *Act*:

> 67. (1) A notice given to an employee under this Part has no effect if
>
> (a) the notice period coincides with a period during which the employee is on annual vacation, leave, temporary layoff, strike or lockout or is unavailable for work due to a strike or lockout or medical reasons, or
>
> (b) the employment continues after the notice period ends.

168. The Appellants say that because these employees were on leave they did not receive effective notice of termination. In my opinion section 67(1) has no application in the circumstances here.

169. Under section 67(1) the notice has no effect for the purposes of reducing an employer's liability under section 64(4) where notice ordinarily, and consistent with common law principles, operates as a credit to the employer in calculating liability, and under section 63(3)(b) where it has the same effect. In such circumstances the notice is ineffective.

170. Thus, under this Part, the notice is not effective to reduce the liability of the employer in these circumstances. The absence of effective notice does not, however, abrogate the termination of the employees. I am reinforced in this interpretation of section 67(1)(a) by section 67(1)(b) that clearly contemplates this situation applying where the employer is continuing, not a termination and change of employer as occurred here. The on-leave employees are included in the group.

SUMMARY

171. In summary, then, I confirm the finding of the Delegate that the employees were terminated and that in the circumstances there was a breach of section 64 of the *Act*. Section 97 of the *Act* does not apply to these employees for the reasons given.

172. With respect to the casual employees, I have found that section 65(1)(a) applies so as to preclude the application of section 64. Because the number of employees is reduced, section 64(3)(a) applies instead of section 64(3)(b).

173. The appropriate calculations for vacation pay are those based on the higher contract amounts and not the lower statutory rates.

174. The matter should be remitted back to the Delegate to make the revised calculations including interest in the manner I have described.

175. I received submissions from the parties regarding calculation and transposition errors made by the Delegate. Such errors, being of a clerical or mathematical nature, are appropriate for correction and should be clearly identified and corrected by the Delegate in the revised calculations.

ORDER

176. Pursuant to section 115 of the *Act*, I order that the Determination be referred back to the Director to amend in accordance with the conclusions outlined above.

John Savage
Member
Employment Standards Tribunal