Employment Standards TRIBUNAL

An appeal

- by -

CSR Holdings Ltd. operating as The Office Bar & Grill
(the "Employer")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2006A/17

DATE OF DECISION: March 14, 2006

DECISION

SUBMISSIONS

Cory Wright	for CSR Holdings Ltd.
Matthew Stretch	on his own behalf
Greg Brown	for the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed by CSR Holdings Ltd. (the "Employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). The appeal concerns a Determination (and accompanying "Reasons for the Determination"—the "delegate's Reasons") both issued on November 23rd, 2005 following an oral hearing (conducted on September 27th, 2005) before a delegate of the Director of Employment Standards (the "delegate").

2. By way of the Determination, the Employer was ordered to pay its former employee, Matthew Stretch ("Stretch"), the sum of $1,244.36 representing 4 weeks' wages as compensation for length of service (see section 63) and section 88 interest. The Employer was also ordered to pay a further $500 as an administrative penalty levied pursuant to section 98 of the *Act* and section 29(1)(a) of the *Employment Standards Regulation.* Thus, the total amount payable under the Determination is $1,744.36.

3. These reasons for decision do not primarily address the merits of the appeal (although, as will be seen, I am of the view that this appeal is not meritorious). Rather, there is a question about the timeliness of the appeal [see section 112(3) of the *Act*] and, accordingly, that matter must first be adjudicated. I am addressing the application to extend the appeal period based solely on the parties' written submissions. However, prior to addressing the timeliness of the appeal, I shall briefly outline the background facts.

BACKGROUND FACTS

4. The following factual summary is taken from the delegate's Reasons and from the other material that is before me. The Employer operates a restaurant in Maple Ridge known as "The Office Bar & Grill". Mr. Stretch was employed as the restaurant's "kitchen manager" from September 17th, 2000 to the date of his termination, allegedly for cause, on April 12th, 2005. At the time of his termination, Mr. Stretch was earning $11 per hour.

5. Mr. Stretch's termination was based on "poor performance" and the culminating incident appears to have been his late arrival for work (by about 30 minutes), on April 12th, 2005.

6. The delegate was not satisfied that the Employer proved it had just cause for termination and, accordingly, the Employer was ordered to pay Mr. Stretch 4 weeks' wages as compensation for length of service.

REASONS FOR APPEAL

7. The Employer appeals the Determination on the grounds that the Director's delegate failed to observe the principles of natural justice in making the Determination [section 112(1)(b)] and that it now has evidence that was not available when the Determination was being made [section 112(1)(c)]. I have reviewed the Employer's appeal documents and, having done so, must conclude that the Employer has not tendered any evidence that was not available at the time the Determination was being made. Accordingly, this latter ground of appeal is summarily dismissed pursuant to subsections 114(1)(c) and (f) of the *Act.*

8. In essence, the Employer argues that the delegate erred in determining that the Employer failed to prove it had just cause to terminate Mr. Stretch's employment [see section 63(3)(c)]. This ground of appeal is more appropriately characterized as an alleged error of law—see section 112(1)(a). Regarding the natural justice issue, the Employer argues that the delegate's failure to hear the *viva voce* evidence of one of its witnesses, Shawn Melville (although the delegate made several unsuccessful attempts to reach Mr. Melville by telephone during the hearing), amounted to a breach of the rules of natural justice.

9. The Employer does not contest the amount of the Determination in the event that this Tribunal concludes Mr. Stretch was entitled to compensation for length of service.

10. I now turn to the timeliness of the appeal.

TIMELINESS OF THE APPEAL

11. The Employer's Appeal Form (and attached documents) was filed on January 26th, 2006.

12. An appeal of a determination must be filed, in writing, with the Tribunal within "30 days after the date of service of the determination, if the person was served by registered mail" [see section 112(3)(a) of the *Act*]. However, if the appeal is not filed within this latter statutory time limit, the Tribunal may extend the appeal period pursuant to section 109(1)(b) of the *Act.*

13. As noted above, the Determination and the delegate's "Reasons for the Determination" were both issued on November 23rd, 2005. The Determination and Reasons were forwarded by certified mail to the Employer's business address and to its registered and records office (a law firm situated in Port Coquitlam). In addition, the Determination and Reasons were separately mailed to each of the Employer's officers and directors (six individuals).

14. The Determination contains a Notice, at the top of page 3, relating to appeals and this Notice states that the appeal deadline was 4:30 P.M. on January 3rd, 2006. I presume that this deadline was calculated taking into account the "deemed service" provision contained in section 122(2) of the *Act.* Accordingly, the actual appeal period may have expired prior to January 3rd, 2006 depending on when the registered envelope containing the Determination and Reasons was actually delivered to the Employer's business office or registered and records office.

15. As noted above, the Employer's Appeal Form was filed on January 26th, 2006, over 3 weeks after the appeal period expired.

16. Section 4 of the Appeal Form addresses late appeals and in this section the appellant is directed to provide an explanation regarding why their appeal was filed after the appeal period expired. Cory Wright, a

corporate director and the Employer's representative at the September 27th, 2005 Complaint Hearing, provided the following explanation:

> We faxed a copy off to your office prior to the January 3, 2006 deadline. I did a follow up call to get an update on the status of the filing and found out that a copy had never made it through to your side. I don't have a specific reason why the faxes never reached your office but I am doing my best to correct the problem. I feel very strongly that our case was not properly viewed and our key individual, Shawn Melville – Director of Food Operations was unable to attended [sic] the hearing.
>
> I am also proposing to put $1000 dollars [sic] in trust to show good will [sic].

17. By way of a letter dated February 13th, 2006, the parties were given until February 27th, 2006 to file their final submissions regarding the "timeliness of the appeal" issue. The only material submitted by the Employer regarding the timeliness of the appeal is that contained in the Employer's original Appeal Form (reproduced above). In addition, I have before me the following submissions (and supporting documents):

- Submission dated February 3rd, 2006 filed by the Director's delegate: and
- Submission dated February 7th, 2006 filed by Mr. Stretch.

THE PARTIES' SUBMISSIONS

18. As noted above, the Employer's position appears to be that it intended to file a timely appeal—and faxed its appeal documents to the Tribunal "prior to the January 3, 2006 deadline"—however, for some unexplained reason the Tribunal never received the Employer's documents before January 3rd, 2006.

19. Mr. Stretch, in his brief submission, calls into question the veracity of the Employer's assertion regarding its unsuccessful attempt to submit its appeal documents by fax:

> If in fact they did send you a fax shouldn't they have either a confirmation or a failed copy of that fax. If you look at CSR Holdings history you will see they inconveniently cancelled 2 hearings the day before these hearings and on the final hearing none of their witnesses showed up.

20. The Director's delegate, in his February 3rd submission, opposes the Employer's application to extend the appeal period and submits that the appeal itself is not meritorious since the Employer is simply asking the Tribunal to "re-weigh" evidence that was previously considered.

FINDINGS AND ANALYSIS

21. The Employer's application to extend the appeal period is refused. I am refusing the application on two grounds. First, I am not satisfied that the Employer has provided a *bona fide* explanation for its failure to file a timely appeal. Second, even if I were satisfied that the appeal period should be extended, this appeal, in my view, has no reasonable prospect of success. In my view, extending the appeal period would run afoul of the section 2(d) purpose of providing "fair and efficient procedures for resolving disputes" because, in this case, the appeal would in any event ultimately be dismissed.

22. The Employer did not specify when it filed its Appeal Form, only that it was filed "prior to the January 3, 2006 deadline". The Employer should have been able to provide a record indicating when the fax was actually transmitted. Further, if the fax was not successfully transmitted, that failure should have been apparent by way of notice generated by the fax machine itself—in which case, the Employer could have rectified the matter in a timely fashion. Further, I am somewhat at a loss as to why the Employer would not have followed up with the Tribunal regarding receipt *before* the appeal deadline passed rather than waiting until after the deadline expired. The Employer has not stated who faxed the document and I do not have a sworn statement from that unnamed person regarding their having faxed the Appeal Form. All I have before me is a vague and unsworn statement that the Appeal Form was forwarded by fax prior to the January 3rd, 2006 deadline.

23. Accordingly, I am not persuaded, on the balance of probabilities, that the Employer attempted to file a timely appeal. I am not satisfied that the Employer has proven an on-going intention to appeal and it has not, in my view, provided any credible explanation for its failure to file a timely appeal.

24. Even if I were inclined to extend the appeal period, this appeal will inevitably fail. The question of just cause is one of mixed fact and law. The delegate set out in his Reasons the evidence before him and he also properly instructed himself regarding the governing legal principles. I see no basis whatsoever for setting aside the delegate's conclusion that the Employer failed to prove it had just cause.

25. As for the "missing testimony" of one of its witnesses, Mr. Shawn Melville, that matter was fully discussed in the delegate's Reasons (at page 9). The Employer did not bring Mr. Melville to the hearing but asked that he be contacted in order to give his evidence via teleconference. Several unsuccessful attempts were made to contact Mr. Melville and, indeed, the hearing was adjourned for 30 minutes so that he might be contacted. In the end result, a written statement from Mr. Melville was tendered and accepted into evidence by the delegate.

26. I have before me an undated statement apparently signed by Mr. Meville (it is addressed to the "Labour Board"). In this letter, Mr. Melville "explained" that he was unable to attend the Complaint Hearing because "I have other obligation that I could not postpone" (sic)—that is the only explanation offered. I have no idea what this "other obligation" was and, in any event, it would appear that the substance of Mr. Melville's evidence was heard and considered by the delegate (in the form of the written statement). The undated statement that is before me is the same statement that was before the delegate (it was marked as "Exhibit 5").

27. In my view, the delegate did not fail to comply with the rules of natural justice when he proceeded without the "in person" or "teleconference" testimony of Mr. Melville. It was the Employer's burden to produce its witnesses and there is simply no reasonable explanation as to why Mr. Melville could not have attended the Complaint Hearing (either in person or by teleconference). Further, Mr. Melville's evidence was "available" at the time of the Complaint Hearing and, in fact, was received by the delegate (see "Exhibit 5"). The delegate considered Mr. Melville's evidence—along with all of the other evidence tendered by the Employer—but ultimately found it did not support a finding of just cause. I cannot say that the delegate erred in this regard.

28. An employer seeking to justify summary termination based on poor performance must prove: i) the *fact* of the poor performance; and also ii) that it made reasonable efforts to assist the employee to improve his or her performance; iii) that it gave the employee reasonable notice that his or her employment was in jeopardy if there was no improvement; and, finally, iv) that despite such notice and the employer's

assistance, the employee's performance did not improve (see e.g., *Kruger*, B.C.E.S.T. Decision No. D003/97). The evidence before the delegate fell well short of establishing just cause based on poor performance.

29. An appeal to the Tribunal is not a new opportunity to prove just cause; rather, the Tribunal must determine if the delegate correctly determined the cause issue based on the evidentiary record that was before the delegate (and as supplemented by any properly admissible new evidence). There is no properly admissible new evidence and, in my view, the delegate's decision on the cause issue, based on the evidence that was before him, is unassailable.

30. The Tribunal may dismiss an appeal "without a hearing of any kind" if the appeal is "frivolous, vexatious or trivial" [section 114(1)(c)] or if "there is no reasonable prospect that the appeal will succeed" [section 114(1)(f)]. While I am not necessarily satisfied that this appeal is vexatious, I am satisfied that it is frivolous and/or trivial and is otherwise wholly without merit.

ORDER

31. The application to extend the appeal period is **refused.**

32. Pursuant to section 114(1)(b), (c) and (f) of the *Act*, I order that the appeal be dismissed. It follows that the Determination is confirmed as issued in the amount of **$1,744.36** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal