



An appeal

- by -

Spirit Ridge Resort Holdings Ltd.
("Spirit Ridge")

- 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.: 2012A/44

DATE OF DECISION: July 11, 2012

DECISION

SUBMISSIONS

Steve Schwartz	counsel for Spirit Ridge Resort Holdings Ltd.
Miles Kroeker	on his own behalf
Kathleen Demic	on behalf of the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed by Spirit Ridge Resort Holdings Ltd. (“Spirit Ridge”) pursuant to subsection 112(1)(a) of the *Employment Standards Act* (the “*Act*”). Spirit Ridge says that a delegate of the Director of Employment Standards (the “delegate”) erred in law in issuing a Determination, dated March 27, 2012, ordering it to pay \$51,149.48 in unpaid wages and section 88 interest plus a further \$1,000 in section 98 penalties (the “Determination”). More specifically, Spirit Ridge says that the delegate erred in her interpretation and application of section 97 of the *Act* – the so-called “successorship” provision.
2. I am adjudicating this appeal based on the parties’ written submissions and I have before me submissions filed by legal counsel for Spirit Ridge, one of the several employees named in the Determination, and from the delegate. In addition, I have also reviewed the section 112(5) record that was before the delegate when she issued the Determination and the delegate’s “Reasons for the Determination” (the “delegate’s reasons”).
3. Spirit Ridge also applies for a section 113(2)(b) order suspending the effect of the Determination pending the adjudication of this appeal upon deposit of 10% of the total amount of the Determination with the Director. However, in light of the fact that I am now addressing the appeal on its merits by way of these reasons for decision, I do not find it necessary to deal with the suspension application.

BACKGROUND FACTS

4. The relevant facts are, for the most part, not in dispute. Spirit Ridge Vineyard Resort Inc. operates a luxury resort in Osoyoos. There is an “amenities” building within the resort that is apparently owned and operated by the present appellant, Spirit Ridge. Spirit Ridge, in turn, leased the restaurant in the building to a numbered company, 0755506 B.C. Ltd, a company controlled by Paul LaGrange. Mr. LaGrange’s mother, Annette LaGrange, managed the restaurant then known as “Passa Tempo”. I shall refer to the numbered company as “Passa Tempo”.
5. In the late summer of 2011 the Employment Standards Branch received a number of unpaid wage complaints from the restaurant’s employees. There is no dispute that these restaurant employees did not receive their wages for a 3-week period from July 31 to August 19, 2011. Similarly, there is no dispute about the fact that Spirit Ridge took over the restaurant’s operations as and from August 20, 2011, and has, since that time, paid the employees their earned wages (save for a dispute about one employee’s entitlement to section 63 entitlement to compensation for length of service). The central issue in this appeal is whether Spirit Ridge is liable for the employees’ wages earned during the July 31 to August 19, 2011, period.
6. As I understand the situation, Passa Tempo regularly submitted invoices to Spirit Ridge (or perhaps to an affiliated company – the record is not entirely clear on this point) and in the late summer of 2011 a dispute

arose between Passa Tempo and Spirit Ridge regarding the latter withholding payment for some of the former's invoices. This dispute put a severe strain on Passa Tempo's cash-flow. The employees' August 19, 2011, payroll date was looming and, accordingly, Annette LaGrange posted a notice on the staff bulletin board advising the employees that their pay would be delayed until August 23, 2011. It is important to note that Passa Tempo *never* issued formal termination notices to any of its employees.

7. In the mid-afternoon of Friday, August 19, 2011, Mr. Ralf Strub (who I understand was Spirit's Ridge's chief executive officer) summoned Ms. LaGrange to a meeting where the issue regarding Passa Tempo's invoices (and its consequent impact on the latter's ability to meet its payroll obligations) was discussed. This meeting ended with Spirit Ridge apparently still refusing to pay the disputed invoices. Mr. LaGrange and his mother discussed the situation and concluded that they would "hand back" the restaurant to Spirit Ridge. On Saturday, August 20, 2011, at about 10 AM, Annette LaGrange met with Mr. Strub and during the course of this meeting she gave the restaurant's keys to Mr. Strub stating words to the effect "the restaurant is yours now".
8. Mr. Strub, for his part, largely corroborated Ms. LaGrange's version of events saying that Ms. LaGrange "laid the keys on the table and said the restaurant is yours" (see delegate's reasons, page 5). In addition, Mr. Strub maintained that Ms. LaGrange signed some sort of document confirming that Passa Tempo had agreed to abandon the business. The record before me includes a document emanating from Spirit Ridge confirming the abandonment of the premises; however, the only signature on this document is by someone (the signature is illegible) on behalf of Spirit Ridge. The delegate found that Passa Tempo never signed any document confirming that it abandoned the premises and I cannot find any fault with that particular factual finding. The "abandonment notice", dated August 20, 2011, that Spirit Ridge delivered to Passa Tempo reads as follows:

We confirm that you have today abandoned your operations and surrendered your sub-sub lease [sic].

You will by doing so renege on commitments to many of guests and prospective guest (including a wedding tonight). [sic] In order to avoid damage to the reputation of the resort we will be stepping in to provide continuity of service.

In doing so we will, given the urgency of the situation be compelled to use some of your inventory and equipment. We account for any inventory used in assessing your remaining obligation to us. [sic] We will put you notice at our earliest convenience as to our intentions with respect to surplus inventory. [sic] Since you may have granted security over some or all of your inventory and equipment we will notify your secured creditors of the situation as soon as that is feasible.

9. The Passa Tempo employees worked their normal assigned work schedules from August 19 onward and there was no formal "break" in their service. I also understand that the restaurant maintained its usual service hours during the days in and around August 19 to 20, 2011. On August 20, the employees were informed by Spirit Ridge that it would pay their full wages for the day (and it did so) and offered the employees continued employment by way of the following letter (reproduced in full) that each employee was asked to sign:

We have just heard that PassaTempo is ceasing operations. This leaves us all in a difficult position. We have been supporting PassaTempo for some time by not insisting that it remain current in its obligations. Unfortunately it has not been able to make a go of its operations.

We have come to know you as a staff member of the employer and would like to extend an offer of employment to you. Your employer will be Spirit Ridge Resort Holdings Inc. We will honour your seniority with the Employer and will continue your employment. The law requires that you receive a record of employment from PassaTempo. It will remain liable for any wages or other benefits of

employment accrued to the time you last worked for it. The law provides certain priority to employees for wages due over other creditors.

We cannot say that we will permanently employ you. It is likely that we will look for another contractor to run the food beverage operation. [sic] In the meantime however we would like to carry on business as usual and honour commitments to those many people who have made plans to be married here or come from across the country to meet here. We have a wedding tonight as you know. Therefore we need to know immediately whether you are accepting this offer of employment.

10. I understand that most employees continued on with their usual duties although, in due course, some left voluntarily either to return to school or to accept alternative employment. One employee was dismissed, apparently without cause, but was not paid any compensation for length of service since Spirit Ridge's view was that she did not satisfy the "3-months continuous employment" criterion set out in section 63(1) of the *Act*.

SPIRIT RIDGE'S POSITION ON APPEAL

11. Spirit Ridge says that the Determination should be cancelled on the sole ground that the delegate erred in law in her interpretation and application of section 97 of the *Act*

97. If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

12. More particularly, Spirit Ridge says that the delegate erred in determining that Passa Tempo's business assets had been "disposed of". The term "dispose" is not defined in the *Act* but it is defined in section 29 of the *Interpretation Act* as follows: "dispose" means to transfer by any method and includes assign, give, sell, grant, convey, bequeath, devise, lease, divest, release and agree to do any of those things. Spirit Ridge's legal counsel submits that this latter definition "contemplates...a change in the legal identity [of the employer] when a transfer is taking place" and "that the act of giving a business from the donor to the donee will only have been completed once the donee accepts whatever is being given to him". Counsel makes the further argument:

Because of Passa Tempo's financial difficulties, Ms. LaGrange unilaterally and on her own accord, due to no persuasion by [Spirit Ridge], made the decision to terminate the business and terminate the lease with the Appellant, by dropping the keys to Mr. Strub and stating "*the restaurant is yours*". (*italics in original text*) [Spirit Ridge] will argue that, in the context of the circumstances, the 'reasonable observer' will characterize Ms. LaGrange's act as one of abandonment, and not a transfer where a change in a legal identity has taken place, because Mr. Strub did not, at that moment, accept the business. He merely accepted the keys to the premises that the business was run in, the premises that [Spirit Ridge] already owned. That is, the act of transfer the keys [sic] was an act of transfer from a financially distressed renter to a landlord, not of a transfer of a business from one employer to another.

13. Counsel asserts that "abandonment is not a disposition as contemplated by Section 97 of [the *Act*]" and that there was a critical intervening 2-hour period after abandonment and prior to Spirit Ridge deciding to continue to operate the restaurant:

...[Spirit Ridge's] position is that Passa Tempo abandoned the business, that no 'giving' took place because there was no change in legal identity of the business at this meeting, and that it was not until 2 hours after Passa Tempo abandoned the business did [Spirit Ridge] decide to operate the business so that [Spirit Ridge] can satisfy short-term immediate obligations to clients that have already booked [Spirit Ridge's] venue (namely, a wedding reception that was booked for the very next day).

FINDINGS AND ANALYSIS

14. The point now being argued on appeal is essentially the same argument that was advanced before the delegate, namely, that Passa Tempo abandoned the business and entirely new employment relationships, not affected by section 97 of the *Act*, were shortly thereafter concluded with Passa Tempo's former employees. The delegate concluded that there had been a "disposition" within section 97 and that the 2-hour "break" was legally inconsequential. The delegate, at page 7 of her reasons, stated:

Spirit Ridge asserts that it did not "decide" to operate the business until two hours after the 10:00 a.m. disposition and therefore the two hour period constitutes an interruption in employment. I reject this argument because many of the employees I spoke with who were at work that day state they continued working throughout the day and the restaurant did not shut down at any time. Further, employees who were at work prior to 10:00 a.m. were paid by Spirit Ridge for the entire day, not just from 10:00 a.m. or 12:00 p.m. onward.

Section 97 is triggered when the individual in question is an "employee of the business" on the date of the disposition. There is no evidence that any employee was terminated by Passa Tempo prior to August 20, 2011. As a result, Spirit Ridge became responsible for payment of any outstanding wages owed to those who were employees on that date. This also means that Spirit Ridge is obligated to honour length of service for those whom it terminated subsequent to the disposition. (underlining in original text)

15. At the outset of my analysis, I wish to make it clear that I do not conceive that section 97 is triggered simply because a landlord takes distraint proceedings. On the other hand, it is also clear that in this instance Spirit Ridge was not simply enforcing its rights under a commercial lease; rather, Spirit Ridge continued to operate the business (and, on the facts of this case, there was no interruption whatsoever in the business operations) after Passa Tempo gave notice that it was surrendering its right to operate the restaurant under its sub-lease. The central question, of course, is whether, on the facts of this case, the restaurant assets were "disposed of" so that section 97 was triggered.
16. The evidence indicates that none of Passa Tempo's employees was ever formally terminated prior to the surrender of the premises back to Spirit Ridge. Insofar as the employees were concerned, their employment continued uninterrupted by the surrender and Spirit Ridge gave written notice to the employees that if they wished to continue in the latter's employ, the terms and conditions of their employment would not change and, in addition, Spirit Ridge would "honour their seniority". Accordingly, all of the employees were "employed" as of the date of the surrender; the question is whether the surrender was a "disposition" within section 97.
17. The term "disposition" is not defined in the *Act* but, as noted above, "dispose" is defined, in very broad terms, in section 29 of the *Interpretation Act*. In *Sealey v. Crysta*, 1987 CanLII 2665, our Court of Appeal held that section 29 included a transfer of ownership or possession. In *Chow v. Pearson*, 1992 CanLII 451, Justice MacKinnon of our Supreme Court held:

The defendants contend that before a disposition and ultimately a settlement can occur, a defendant must have done something positive to effect the transfer.

I do not agree. The manner in which a disposition takes place is not important. The disposition involves the transfer of property from one party to another. It is irrelevant if the transfer is a consequence of an act of commission or an act of commission [sic, "omission"?].

18. Our courts have also emphasized that the meaning to be ascribed to "dispose" will vary with the factual and legislative context and thus, for example, a chattel mortgage could be considered to be a disposition (*Canadian Imperial Bank of Commerce v. Campbell*, 1984 CanLII 813 (B.C.S.C.)), as could an option granted to purchase a

portion of common property within a strata development (*The Owners, Strata Plan VIS2968 v. K.R.C. Enterprises Inc.*, 2009 BCCA 36) or the designation of a beneficiary under a registered retirement savings plan account (*Robson v. Robson (Re Sykes)*, 1998 CanLII 4597 (B.C.C.A.)).

19. I think it important to note that section 2 of the *Act* sets out certain statutory purposes including subsection 2(a): “to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment”. Section 97 must be interpreted in light of this statutory provision since, clearly, the purpose of this provision is to enhance employees’ abilities to recoup their unpaid wages. That said, section 97 must not be stretched beyond its actual parameters. The introductory words in the statutory definition of “dispose” state that the term “means to transfer *by any method*” and the following mechanisms such as assign, give, sell etc. are merely examples of how a transfer may be effected.
20. In this case, it is conceded that Spirit Ridge took possession of the business assets and continued to operate the restaurant without any formal assignment or legally documented transfer of these assets. While there may have been a 2-hour gap between the surrender and Spirit Ridge’s subsequent decision to continue to operate the restaurant, this gap was not transparent to the employees and there was no interruption in the business operations of the restaurant. As noted in the delegate’s reasons, Spirit Ridge actually paid the employees their full wages earned on August 20, 2011, not merely those wages earned after 12 noon. Spirit Ridge advised the employees, in writing, that it was “continuing” their employment (with full credit for accrued seniority) and in its notice to Passa Tempo, it advised that it was “stepping in to provide continuity of service”. Further, Spirit Ridge also took possession of “inventory and equipment” but indicated that it would account to Passa Tempo for any inventory used. In my judgment, the only reasonable interpretation to be placed on this latter action is that Spirit Ridge considered itself entitled, since it was continuing the restaurant operations, to take possession of, and some sort of title interest in, the restaurant’s inventory. This action was not simply a landlord seizing the inventory on account of unpaid rent; rather, Spirit Ridge seized the inventory in order to continue the restaurant operations and its use of the business assets, with Spirit Ridge’s apparent concurrence, can be a disposition within section 97 (see *Artech Machine & Tool*, BC EST # D147/04). In effect, Spirit Ridge became the new operator (without there being any interruption in the normal business operations) using the assets and inventory formerly held by Passa Tempo. I consider this situation to amount to a surrender of assets by Passa Tempo to Spirit Ridge coupled with the latter’s acceptance of this surrender. To put the matter a different way, there was a “transfer” of the business assets (at least with respect to inventory) and thus a “disposition” within section 97 of the *Act*. Whereas Passa Tempo had formerly operated the business, it was now being operated by Spirit Ridge. The Tribunal has previously held that “section 97 is broad enough to include any disposition that results in a change in the legal identity of the employer” (*Lari Mitchell et al.*, BC EST # D107/98 at p. 11) and in this case the employees seamlessly transitioned from Passa Tempo’s employ to being employed by Spirit Ridge.
21. Even if one were to accept Spirit Ridge’s assertion that there was a 2-hour gap between the surrender of Passa Tempo’s assets and Spirit Ridge’s decision to assume control of the restaurant’s operations (including taking possession of the restaurant’s assets), there is simply no evidence that the Passa Tempo employees were ever terminated before Spirit Ridge assumed control of the restaurant’s operations. Accordingly, and accepting Spirit Ridge’s position that it did not assume control of the business assets until 12 noon on August 20, 2011, *at that point in time*, the Passa Tempo employees were still in the latter firm’s employ. Clearly, there was a change, sometime around noon, in the legal identity of the employer because Spirit Ridge made formal offers of continuing employment to all Passa Tempo employees. Passa Tempo divested itself or otherwise released the restaurant assets to the custody and control of Spirit Ridge and when that disposition occurred, all of Passa Tempo’s employees then fell within the protection of section 97.

22. The present case is not akin to section 97 decisions, such as *Valerosos* (BC EST # RD046/01) and *550635 BC Ltd.* (BC EST # D272/99), where the employees *were* terminated prior to the disposition. Spirit Ridge could have held off assuming control of the restaurant until such time as the employees were clearly terminated from their former employment with Passa Tempo; however, presumably for its own pragmatic business reasons, Spirit Ridge decided to simply assume control of the restaurant without insisting that the employees had first been formally terminated from their prior employment.
23. The present case is not unlike the situation in *Piney Creek Logging Ltd.* (BC EST # D546/98) where the “successor” took over a logging contract from the predecessor employer and business operations continued uninterrupted with the same workforce using the same tools and equipment as when they were in the predecessor’s employ (see also *Mebar Forest Products Ltd.*, BC EST # RD040/02, and *Sladey Timber Ltd.*, BC EST # D360/02, to like effect). In this case, in addition to taking control of the restaurant’s fixed assets and inventory, Spirit Ridge apparently took over existing catering and other contracts that had been negotiated with, and presumably would have been performed by, Passa Tempo.
24. Although it may be accurate to state, as Spirit’s Ridge’s counsel does, that “the employees did not belong to [Spirit Ridge] at the time of the abandonment”, it does not follow, as is also asserted by counsel, that “Spirit Ridge cannot be held liable for Passa Tempo’s failure to properly terminate its employees”. The purpose of section 97 is to override the common law and deem existing employees of the predecessor firm to be employees of the successor firm as and from the employees’ original date of hire with the predecessor (see *Lari Mitchell et al., supra*). It is precisely for this reason that a potential successor must ensure, if it does not wish to be caught within section 97, that the employees of the predecessor firm are terminated *prior* to the disposition of the assets.
25. In my view, on or about August 20, 2011, there was a disposition of the restaurant’s assets (including the trade fixtures, inventory and existing catering and other contracts) from Passa Tempo to Spirit Ridge. As of the date of this disposition, none of the employees named in the Determination had been terminated and thus were still formally employed by Passa Tempo. As such, their employment was deemed to be continuous and uninterrupted by the disposition and thus Spirit Ridge and Passa Tempo are both liable for the employees’ unpaid wages as set out in the Determination.
26. I now turn to the question of whether the delegate correctly determined that Spirit Ridge was obliged to pay one particular employee, terminated on September 9, 2011, compensation for length of service. The delegate determined, at page 8 of her reasons, that this employee was terminated without just cause or written notice and Spirit Ridge does not challenge that finding. However, Spirit Ridge says that since this employee had less than 3 months’ consecutive service, it was not obliged to pay any section 63 compensation for length of service. There are two answers to this submission.
27. First, in light of my finding that Spirit Ridge was a section 97 successor, this employee’s service dates from her original date of hire with Passa Tempo (April 5, 2011), not from her formal date of employment with Spirit Ridge (August 20, 2011). Given this period of service, the employee was entitled to 1 week’s wages under section 63(1).
28. Second, as noted above, when Spirit Ridge formally employed the employees it gave each of them a written assurance that it would “honour your seniority”. This was a representation made to the employees within section 8 of the *Act* in order to encourage the employees to continue working in the restaurant. As such, the delegate could equally have held Spirit Ridge liable under sections 8 and 79(2) of the *Act*.

ORDER

29. Pursuant to section 115(1)(a) of the *Act*, the Determination is confirmed as issued in the total amount of \$52,149.48 together with whatever additional interest that has accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal