

An appeal

- by -

Tregunter Holdings Ltd., Top Gun Lounge Ltd., Top Win Café Ltd., T.G. 223 Ventures Ltd.,
Granville Sushi Ltd., Richmond Japanese Sushi Ltd., Top Gun Restaurant Holdings Ltd.
operating as Top Gun Chinese Seafood, 589934 B.C. Ltd. operating as Garden City Hotpot,
T.B.W. Investments Ltd. operating as Top Gun Broadway Chinese Seafood and MB Techno
Management Ltd. operating as Top Gun Surrey

- 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

ADJUDICATOR: Norma Edelman

FILE No.: 2001/866

DATE OF DECISION: February 28, 2002

DECISION

OVERVIEW

This is an appeal by Tregunter Holdings Ltd., Top Gun Lounge Ltd., Top Win Café Ltd., T.G. 223 Ventures Ltd., Granville Sushi Ltd., Richmond Japanese Sushi Ltd., Top Gun Restaurant Holdings Ltd. operating as Top Gun Chinese Seafood, 589934 B.C. Ltd. operating as Garden City Hotpot, T.B.W. Investments Ltd. operating as Top Gun Broadway Chinese Seafood and MB Techno Management Ltd. operating as Top Gun Surrey (the "Ten Companies" and the "Appellant") pursuant to Section 112 of the Employment Standards Act (the "Act") of a Determination issued by a delegate of the Director of Employment Standards on June 14, 2001. The delegate found that the Ten Companies were associated pursuant to Section 95 of the Act with Top Gun Bowling Investments Ltd. ("Top Gun").

In this appeal, the Appellant raises several issues including the issue of whether the Ten Companies are associated with Top Gun.

This case has been decided on the basis of the written submissions of the parties. I have decided that the appeal is successful as it pertains to the Section 95 issue and have referred that matter back to the delegate for further investigation.

FACTS AND ANALYSIS

On March 27, 2001 the delegate issued a Determination against Top Gun. He found that Top Gun operated a bowling center and that the landlord closed the premises. No notice or compensation for length of service was given to the employees when the business was shut down. As a result the delegate ordered Top Gun to pay compensation for length of service to Ronald J. Corby, Kinman Dang, Dianne Kuiack, Hari Narayan and Akihito Takimoto (the "Respondents") in the total amount of \$15,456.27 including interest.

Top Gun appealed the Determination. The Tribunal confirmed the Determination in Decision BCEST #D619/01. Top Gun subsequently requested a reconsideration of that Decision and in Decision BCEST #RD058/02 the Tribunal denied the request.

On June 14, 2001 the delegate issued the Determination, which is the subject of this appeal. The delegate concluded that the Ten Companies were associated with Top Gun pursuant to Section 95 of the Act and thus all were liable for compensation for length of service for the Respondents. He ordered the Ten Companies to pay compensation for length of service to the Respondents in the amount of \$15,663.83 including interest.

The delegate concluded that the Ten Companies were associated with Top Gun on the following basis:

...the major directors of the corporation are Edward Leung, Albert Leung, Raymond Leung, Hin Cheung Leung, Thomas Leung and Ken Chan. The Leungs are related as brothers or brothers-in-law.

The corporations presented themselves as the Top Gun Group to the public and in business dealings. Tregunter Holdings Ltd. has been dealing with our Branch with respect to Top Gun Bowling Investments Ltd., Top Win Cafe and Top Gun Entertainment Ltd. All administrative services originated from the same office located in Richmond.

The letter heads used by Tregunter Holdings Ltd. has the Top Gun logo and Top Gun wordings.

The name card used by Albert Leung under Tregunter Holdings Ltd. also has the Top Gun logo and described the corporation as a member of Top Gun Bowling & Restaurants Group.

The payroll for the Top Gun Group are also produced by the same office in Richmond.

...the corporations are obviously under common control and management of the same group of people.

(reproduced as written)

The Ten Companies appealed the Determination. They say the Determination should be cancelled or referred back for the following reasons:

- The Respondents filed complaints against Top Gun and not the Ten Companies. There is no evidence to prove that the Respondents filed their complaints against the Ten Companies within the time limit set out in Section 74(3) of the Act. Further, the Ten Companies were not given an opportunity to respond to the investigation/complaints contrary to Section 77 of the Act.
- The Determination has been issued contrary to Section 82 of the Act.
- The delegate should have issued only one Determination. That is, the associated corporations issue should have been included in the Determination issued against Top Gun. Further, the delegate should not have issued the Determination against the Ten Companies before the Tribunal had decided the appeal of the Determination issued against Top Gun.

- Top Gun was not the employer of the Respondents.
- The Respondents have changed their positions.
- Thomas C. Leung is not the President/Secretary of MB Techno Management Ltd.; Stephen Leung is not the President, Albert Leung is not the Secretary and Alan Leung is not the director/officer of Tregunter Holdings Ltd.; Edward Leung and Raymond Leung are not directors/officers of T.G. 223 Ventures Ltd.; Julisa Too, Wing Lit Fong, Angela Leung, Clara Law and Chung Wo Mak are not the directors/officers of Richmond Japanese Sushi Ltd.; Stephen Leung is not the director/officer of 589934 B.C. Ltd.
- T.B.W. Investments Ltd. and MB Techno Management Ltd. closed their businesses in 2000 and have no assets.
- Brothers or relatives can run different businesses but this doesn't mean the businesses are associated.
- The management office is shared in order to minimize cost. The operations have different controlling shareholders and directors.
- Top Gun Group is not a legal entity. The Respondents did not work for Top Gun Group but were employees of Top Gun Bowling Centre.
- The logo and the payroll issues do not mean the companies are associated. It is common for some accountant firms or management companies to do jobs for their clients and other unrelated operations. Top Gun Entertainment Ltd. issued the paycheques for the Respondents only.
- The shares of the companies and the directorship show the corporations are not under common control.
- Top Gun Bowling Investments Ltd., and some of the Ten Companies were clients of the management company, Tregunter Holdings Ltd. and have their own shareholders and directors. This does not mean that Tregunter Holdings Ltd. is associated with the other companies.
- By issuing the Determination against the Ten Companies, the Respondents get a double remedy.

The Appellant subsequently filed a further submission dated January 3, 2002 referring the Tribunal to Decision BCEST #D646/01 and it enclosed a letter it previously submitted to the Tribunal with its request for a reconsideration of Decision BCEST#D619/01. The letter for the most part reiterates the Appellant's position as noted above.

The delegate and the Respondents were invited to reply to the appeal. Only the delegate replied and he stated that the form letters provided by the various associated companies were sent out from the same fax machine from Tregunter Holdings Ltd. Further, all the companies share the same office address, telephone number and fax number. He said the Appellant's attempt to deny the association shows exactly the opposite.

The burden is on the Appellant to show that the Determination should be varied, cancelled or referred back to the delegate. I am satisfied that the Appellant has met that burden but only as regards the Section 95 declaration.

First, I accept that the Respondents filed their complaints within the time limits set out in Section 74(3) of the Act. In Decision BCEST #D619/01 (upheld on reconsideration in Decision BCEST #RD058/02) the Tribunal decided that the Respondents filed timely complaints against Top Gun and that Decision is final. When the Respondents filed their complaints they were not required to name all the associated companies. It is sufficient that they filed their complaints against Top Gun within the time limits set out in the Act. It then became the responsibility of the delegate as the investigator to decide whom to name in a Determination.

Second, I am satisfied the Appellant was given an opportunity to respond to the investigation/complaints. The Appellant itself admits that the issue of associated corporations was raised during a meeting with the delegate on December 12, 2000. This meeting preceded the issuance of the Determination.

Third, there is nothing in the Act that says the delegate could only issue the Determination against the Ten Companies after the Tribunal decided the appeal of the Determination issued against Top Gun. As well, the delegate was not prevented from issuing more than one Determination in the course of his investigation. Section 82 of the Act refers to proceedings other than proceedings under the Act.

Fourth, the issue of whether Top Gun was the employer of the Respondents has been decided in Tribunal Decision BCEST #D619/01 (and upheld on reconsideration in Decision BCEST #RD058/02). The Appellant is estopped from raising this issue yet again on this appeal.

Fifth, I am unable to find that the Respondents' positions in the two Determinations are different regarding the issuance of cheques. In the Determination issued against the Ten Companies the delegate says the Respondents indicated they received cheques from at least two of the corporations. However, there is absolutely nothing in the Determination issued against Top Gun about the matter.

Sixth, there is no double remedy as a result of the delegate issuing a Determination against Top Gun and one against the Ten Companies. The delegate can only collect one amount.

Finally, I do accept that the Determination is incomplete regarding the Section 95 issue.

Section 95 of the Act provides:

95. If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association or any combination of them under common control or direction,

- (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purpose of this Act, and
- (b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal, and this Act applies to the recovery of the amount from any or all of them.

The Tribunal has consistently held there are four preconditions to an application of Section 95 to the circumstances of any matter before a delegate of the Director of Employment Standards (see *Invicta Security Systems Corp.* BCEST #D249/96). They are:

- 1) there must be more than one corporation, individual, firm, syndicate or association;
- 2) each of these entities must be carrying on a business, trade, or undertaking;
- 3) there must be common control or direction; and
- 4) there must be some statutory purpose for treating the entities as one employer.

In the Determination, the delegate only addresses the third precondition. There is no analysis of the statutory purpose for treating the entities as one employer. Further, although it is evident there is more than one entity involved, the delegate does not indicate what the business is and how each of the Ten Companies and Top Gun actively engaged in some activity that contributed to the totality of the business. Moreover, I am not satisfied that two of the entities were "carrying on a business, trade or undertaking" at the time wages were payable to the Respondents. The Appellant says T.B.W. Investments Ltd. and MB Techno Management Ltd. closed their businesses in 2000. The delegate does not challenge this assertion. If these entities were defunct then they cannot be included in a Section 95 declaration.

The delegate says the Ten Companies and Top Gun are "obviously" under common control and management of the same group of people. I am not satisfied that is the case.

The Appellant argues that several of the persons named by the delegate as officers and directors of certain of the Ten Companies are not in fact officers and directors. The delegate in his reply

to the appeal did not challenge this point. Further, there is nothing in the Determination, such as documents from the Registrar of Companies, to support the delegate's conclusion regarding who are, or were, the officers and directors of the corporations. As such, I am not satisfied that the delegate has established sufficient commonality of directors or officers.

I agree with the Appellant that common control or direction is not established simply because some of the directors or officers are related or that they use the same accountant or management firm or present themselves as members of a group or share logos and letterhead. This is not to say these elements (as well as elements such as sharing space) have no significance but when standing alone, in the absence of sufficient evidence concerning such factors as commonality of directors and officers or shareholders; financial and operational control; integration between the entities; and direction with respect to the decision making process about how the business is run, including the day to day direction of employees, the precondition of common control or direction has not been established.

For the above reasons, I conclude that the delegate has not established that the Ten Companies are associated with Top Gun and the matter should be referred back for further investigation.

ORDER

Pursuant to Section 115 of the Act I refer the matter of the Section 95 declaration back to the delegate for further investigation.

Norma Edelman
Adjudicator
Employment Standards Tribunal