Employment Standards TRIBUNAL

An appeal

- by -

633003 B.C. Ltd. carrying on business as Centro Mediterranean Grill
("Centro")

- 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: Robert Groves

FILE No.: 2008A/80

DATE OF DECISION: September 26, 2008

DECISION

OVERVIEW

1. This is an appeal brought on behalf of 633003 B.C. Ltd. carrying on business as Centro Mediterranean Grill ("Centro") challenging a determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate") dated June 5, 2008. The Determination resulted from a complaint brought by one Marc A. Marins ("Marins").

2. The Delegate decided that Centro had contravened section 63 of the *Employment Standards Act* (the "*Act*") and section 46(1) of the *Employment Standards Regulation*. Centro was ordered to pay $717.88 by way of compensation for length of service and accumulated interest, and two administrative penalties of $500.00 each, for a total of $1,717.88.

3. The Appeal Form which commenced the appeal proceedings names Nick Kerasiotis ("Kerasiotis") as the person who is bringing the appeal. No corporate search material has been delivered to the Tribunal which might shed light on Mr. Kerasiotis' connection to Centro. However, the Delegate's Reasons for Determination, the section 112(5) record, and the submissions I have received identify Mr. Kerasiotis as a principal of Centro. I am prepared to infer from this material that Mr. Kerasiotis is an authorized representative of Centro, and that it is Centro, and not Mr. Kerasiotis personally, who has brought the appeal.

4. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. I have concluded that this appeal shall be decided on the Determination, the Reasons for the Determination, the section 112(5) record, and the submissions received, without an oral hearing.

FACTS

5. Centro operates a restaurant. Mr. Marins was employed there as a server on a part-time basis.

6. The Delegate made several critical findings of fact based on the evidence of Mr. Marins alone. The Reasons for the Determination state that a Notice of Complaint Hearing returnable May 27, 2008 was forwarded to Centro by certified mail and that Centro received it at its operating address. They also state that at the time the Notice specified the hearing would begin an Employment Standards Branch mediator contacted Mr. Kerasiotis, who informed the mediator that he would not be attending. Notwithstanding this communication, the mediator informed Mr. Kerasiotis that the commencement of the hearing would be delayed for one half hour after the designated start time, should Mr. Kerasiotis change his mind. Neither Mr. Kerasiotis nor any other representative of Centro attended the hearing, which the Delegate proceeded to conduct one half hour later. At no time did Mr. Kerasiotis request an adjournment.

7. The Reasons for the Determination reveal that the two issues of concern to the Delegate were a) whether Mr. Marins had filed his complaint within the six month window stipulated in section 74 of the *Act*, and if so, b) what amount of compensation for length of service Mr. Marins should receive.

8. In addition to his working for Centro, Mr. Marins was also employed at a night club in which Mr. Kerasiotis had an interest, and cash shortages having appeared there, Mr. Marins was asked to make reparation. Mr. Marins said that the shortages had arisen due to an innocent error, and that the issue was resolved satisfactorily. Nevertheless, in a telephone discussion on July 22, 2007 Mr. Kerasiotis told Mr. Marins that he was "fired" from his position with Centro. Mr. Marins then attended at Centro and spoke to Mr. Kerasiotis further. Mr. Kerasiotis told Mr. Marins he was going to conduct his own investigation into the club matter. Mr. Marin then checked the shift schedule for Centro for the following week and observed that his name was still listed, but that no shifts had been assigned to him.

9. Mr. Marin continued to work at the club, and awaited developments regarding his position at Centro. On July 29, 2007 he attended at Centro to again check the shift schedule and noted that his name had been removed. At that point Mr. Marins considered his employment at Centro to have been terminated, but he took no steps to pursue any claims under the *Act* because he did not wish to compromise his employment at the club. In January 2008, however, Mr. Marins' employment at the club was also terminated. Mr. Marins filed his complaint against Centro with the Branch on January 22, 2008.

10. Centro had issued a Record of Employment in respect of Mr. Marins' employment, dated August 3, 2007. It stated that Mr. Marins had "quit" and that his last day worked was July 17, 2007. Mr. Marins confirmed to the Delegate that July 17, 2007 was the date of the last shift he actually worked at Centro. Mr. Marins also produced for the Delegate his electronic calendar which contained a notation indicating he had been discharged by Centro on July 22, 2007. He also submitted to the Delegate a two-page handwritten shift schedule for the period July 16-31, 2007, which listed Mr. Marins as an employee.

11. In the absence of any evidence to the contrary from Centro, the Delegate decided that the facts supported a finding that Mr. Marins' employment with Centro had ended on July 22, 2007. Section 74(3) of the *Act* mandates that Mr. Marin had to deliver his complaint to the Branch "within 6 months after the last day of employment." Applying the *Interpretation Act* definition of "month" as a period calculated from a day in one month to a day numerically corresponding to that day in the following month, less a day, the Delegate determined that the six month period commenced to run on July 23, 2007 and that it ended on January 22, 2008. As Mr. Marins had filed his complaint on January 22, 2008, the Delegate determined that he had met the statutory time requirement.

12. There being no evidence suggesting Mr. Marins had "quit," the Delegate calculated the amount of compensation for length of service owed to him. The August 3, 2007 Record of Employment stated that Mr. Marins' first day of employment was March 13, 2004. Mr. Marins challenged this notation before the Delegate. He stated that he had commenced to work at Centro in March 2002, and worked continuously there until he took an approved three week vacation in February 2004. When he returned to work in March 2004 he received a Record of Employment which stated that he had left his employment. While he disagreed with the characterization Centro had placed upon his absence from work, he thought little of it because his employment continued without incident until his dismissal on July 22, 2007.

13. Again, with no evidence to the contrary having been received from Centro, the Delegate accepted Mr. Marins' account of his employment history, and determined that compensation for length of service should be calculated from March 2002, and not March 2004.

ISSUES

14. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

15. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

> 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.

16. Section 115(1) of the *Act* should also be noted. It says this:

> 115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
>
> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) refer the matter back to the director.

17. Centro's Appeal Form advises that evidence has become available that was not available at the time the Determination was being made. It's appeal is therefore grounded in section 112(1)(c) of the *Act*.

18. By way of preliminary comment to any discussion regarding the Tribunal's jurisdiction under section 112 of the *Act*, it is important to remember that the grounds of appeal contained therein are not intended to permit a party who is unhappy with the result in a determination to seek out new evidence to bolster a case that has failed to persuade at first instance. An appeal does not amount to a re-hearing, or a re-investigation of a complaint. It is an error correction process, with the burden of showing error on the appellant (see *MSI Delivery Services Ltd., supra*; *Re Bruce Davies et al.* BC EST #D171/03; *J.P. Metal Masters 2000 Inc.* BC EST #D057/05). If, therefore, it is clear that evidence should have been led at the time of the initial hearing, it will not normally be admitted on appeal under section 112(1)(c) (see *D.J.M. Holdings Ltd.* BC EST #D461/97).

19. Having said that, the Tribunal retains a discretion to allow an appeal based on fresh evidence, but it must be exercised with caution. One of the criteria that the Tribunal will apply in determining whether an appeal should be allowed on this basis is to ask whether the evidence could not, with the exercise of due diligence, have been discovered and presented to the delegate during the investigation or adjudication of the complaint and prior to the determination being made. In other words, was the evidence really unavailable to the party seeking to tender it? At the same time, even if the evidence was not unavailable in this sense, the Tribunal may nevertheless consider it if the appellant can demonstrate that the evidence is important, there is good reason why the evidence was not presented at first instance, and no serious

prejudice will be visited upon the respondent if it is admitted (see *Re Specialty Motor Cars* BC EST #D570/98).

20. It has also been authoritatively stated in several other decisions of the Tribunal that the burden rests on an appellant to ensure the sufficiency of an appeal, and that the material submitted to the Tribunal is adequate to satisfy the legal requirements relating to the matters raised by an appellant in its appeal submission (see *MSI Delivery Services Ltd.* BC EST D051/06).

21. In his submission, Mr. Kerasiotis states that the evidence he now wishes considered is in the form of "a letter from another staff member contradicting the statement made by Marc Marins." No such letter has been submitted to the Tribunal, however, and Mr. Kerasiotis gives no further information as to what, precisely, the letter might contain. Mr. Kerasiotis goes on to say that he can "provide an explanation for a rightful termination," but again, he volunteers no details. There is also no material provided which might explain why this evidence is "new," in the sense that it was unavailable to Mr. Kerasiotis when the Determination was being made.

22. Absent this information, I must conclude that Centro has failed to satisfy the onus which rests on it to establish the requirements for new evidence set out in section 112(1)(c). Centro's appeal on this ground must therefore be dismissed.

23. Centro's Appeal Form identifies no other grounds for appeal, but I discern in Mr. Kerasiotis' submission that it has other matters it wishes to raise. In particular, Mr. Kerasiotis' material says this:

> The appeal was submitted after six months of termination at both the Plaza Nightclub and Centro Mediterranean Grill and the Plaza was not required to pay severance ye the Centro Grill was requested to pay severance to Mark Marins.

24. There are really two issues which Mr. Kerasiotis identifies in this sentence. The comparison to Mr. Marins' experience as an employee at the club, which appears in the latter part of the sentence, is to me entirely irrelevant to the matters I must decide on this appeal. Mr. Marins' complaint, and the Determination which resulted from it, were concerned with Mr. Marins' loss of employment at Centro, and not his dealings with his employer at the club. The Delegate considered Mr. Marins' evidence of the issues that arose at the club, but only for the purpose of determining how they may have affected Mr. Marins' position at Centro. The circumstances of Mr. Marins' departure from the club, and the legal ramifications flowing from it, were of no moment to the Delegate, and they remain so on this appeal.

25. The other issue referred to in the sentence quoted is a substantive one, however, because it challenges the Delegate's conclusion that Mr. Marins had delivered his complaint to the Branch within the six month limitation period that is stipulated in section 74(3) of the *Act*. In my opinion, such a challenge raises a question of mixed law and fact. Section 112(1)(a) of the *Act* clothes the Tribunal with jurisdiction to correct errors of law, and I am not prevented from considering whether the Delegate committed such an error in this case merely because Mr. Kerasiotis did not check the appropriate box on the Appeal Form (see *Triple S Transmissions Inc.* BC EST #D141/03).

26. A question of mixed law and fact involves an error of law where an extricable error on a question of law can be identified in the legal analysis under review (see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.* [1996] SCJ No.116; *Britco Structures Ltd.* BC EST #D260/03). By way of example, an extricable error on a question of law would occur if the decision-maker has applied an incorrect legal standard to the facts as found.

27. Questions of fact, *simpliciter*, are questions about what actually took place between the parties. They are only reviewable by the Tribunal as errors of law in situations where it is shown that a delegate has committed a palpable and overriding error, which involves a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable. Put another way, an appellant will only succeed in challenging a delegate's finding of fact if he establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

28. The Delegate found as a fact that July 22, 2007 was the day on which Mr. Kerasiotis told Mr. Marins that his employment at Centro was terminated. In coming to this conclusion, the Delegate relied on the evidence of Mr. Marins. That evidence was not challenged by Centro, because no representative of Centro attended at the hearing. In his submission, Mr. Kerasiotis does not dispute that Centro had notice of the hearing, nor does he dispute the statements in the Reasons for the Determination to the effect that a Branch mediator contacted him at the commencement of the hearing and invited him to attend, but he did not do so. Instead, Mr. Kerasiotis asserts that he was "unable" to appear, but again no particulars are given. As I have indicated, at no time did Mr. Kerasiotis, or any other representative of Centro, request an adjournment.

29. In circumstances such as these, it is my opinion that the Delegate was entitled to proceed with the hearing absent a representative of Centro, and to make findings of fact based on the evidence presented by Mr. Marins alone. There is no indication in the record that the Delegate accepted Mr. Marins' evidence without weighing it. To the contrary, the Delegate considered the manner in which Mr. Marins delivered his account, his ability to recall pertinent details, and whether his description of the relevant events was reasonable having regard to the other available evidence. Having done so, the Delegate concluded that Mr. Marins was a credible witness, and that his version of what had transpired should be relied upon. This was precisely the task the Delegate was duty bound to perform. I cannot say that the Delegate committed any error of fact amounting to the type of error of law that is reviewable under section 112(1)(a). There is nothing that is perverse, irrational, or inexplicable in the facts as found by the Delegate, including the finding that Mr. Marins was dismissed on July 22, 2007.

30. If, then, Mr. Marins was dismissed on July 22, 2007, does that mean that the six month period commences to run from that date? In other words, was July 22, 2007 Mr. Marins' "last day of employment" for the purposes of section 74(3)? It is clear that the Delegate was alive to this issue, because the Reasons for Determination refer to the fact that the August 3, 2007 Record of Employment issued by Centro stated that Mr. Marins' last day worked was July 17, 2007, a fact that Mr. Marins himself acknowledged.

31. In my view, the Delegate was correct in deciding that July 22, 2007 was Mr. Marins' last day of employment. The six month limitation period does not commence from an employee's last day of work. It begins on the day the employee's employment ceases, whether that is a day on which the employee works or not (see *Mian Huang* BC EST #D159/04).

32. I am also of the opinion that the Delegate did not err in law in applying the test for calculating the six month period stipulated in section 74(3). The application of the time limit within section 74(3) is

informed by sections 25(4), 25(5) and the definition of "month" in section 29 of the *Interpretation Act* RSBC 1996 c.238, which read:

> 25(4) In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days must be excluded.
>
> 25(5) In the calculation of time not referred to in subsection (4), the first day must be excluded and the last day included.
>
> 29. In an enactment:...
>
> "month" means a period calculated from a day in one month to a day numerically corresponding to that day in the following month, less one day;...

33. It will be seen that section 25(4) of the *Interpretation Act* has no application, because the calculation of time in section 74(3) of the *Act* does not speak of six "clear" months, or "at least" six months, or "not less than" six months. Therefore, section 25(5) of the *Interpretation Act* is the relevant section for the purposes of the interpretation of section 74(3) of the *Act*.

34. On the facts presented in this case, Mr. Marins was dismissed on July 22, 2007. An application of section 25(5) of the *Interpretation Act* means that July 22, 2007 must be excluded from the calculation. That means that the "first day" for the purposes of the calculation was July 23, 2007. Pursuant to the definition of "month" in section 29 of the *Interpretation Act*, the day numerically corresponding to July 23, 2007, six months later, less one day, was January 22, 2007. The operation of section 25(5) of the *Interpretation Act* requires that the "last day" in the calculation, that is January 22, 2007, be included.

35. Mr. Marins filed his complaint on January 22, 2007. It follows that the Delegate was correct in deciding that Mr. Marins' complaint was filed within the time stipulated in section 74(3) (see *Schermerhorn* BC EST #D205/98).

ORDER

36. I order that the Determination dated June 5, 2008 be confirmed.

Robert Groves
Member
Employment Standards Tribunal