

An appeal

- by -

Ruhan Enterprises Inc. operating as Jake and Elwood's Sports Bar
(“Ruhan”)

- 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: Carol L. Roberts

FILE No.: 2001/739

DATE OF HEARING: April 10, 2002

DATE OF DECISION: April 12, 2002

DECISION

APPEARANCES

For Ruhan Enterprises	Nigel D'Souza, Ashley Page
On his own behalf	Chris Liggett

OVERVIEW

This is an appeal by Ruhan Enterprises Inc., operating as Jake and Elwood's Sports Bar ("Ruhan"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued October 2, 2001. The Director found that Ruhan had contravened Sections 18, 58 and 63 of the Act in failing to pay Christopher Liggett compensation for length of service and a performance bonus, and Ordered that Ruhan pay \$11,353.96 in wages and interest to the Director on Mr. Liggett's behalf.

ISSUE TO BE DECIDED

Whether the Director erred in determining Mr. Liggett's entitlement to compensation for length of service and a performance bonus. Ruhan's argues that the Determination is against the wrong party.

FACTS

Mr. Liggett worked for Larco Investment Ltd. (Larco) from October 24, 1994 to September 30, 1999, as the floor manager for Jake & Elwood's Sports Bar. Mr. Liggett advised the delegate that he had been paid a bonus as part of his salary for each of those five years, as had Nigel D'Souza.

Mr. D'Souza is the sole director and shareholder of Ruhan.

On October 1, 1999, Ruhan leased the Sports Bar from Larco, and Mr. Liggett continued his employment with Ruhan in the same position and at the same wage rate as he had with Larco. Larco paid Mr. Liggett 10/12 of his bonus for that year, and gave him an ROE. Mr. Liggett understood that his employment with Larco had ended, and that he would be continuing to work for Ruhan.

On June 16, 2000, Mr. Liggett went to work at the Black Tusk Pub, located next to the Sports Bar. The Pub was leased from Ruhan, and operated, by Page Marketing Group ("Page"). He did not receive an ROE from Ruhan, nor did Mr. D'Souza ask him to return his keys. In fact, Mr. Liggett continued to perform work at the Bar.

In September 2000, Mr. Liggett resigned his position to work part time. Page issued Mr. Liggett an ROE indicating that his last day of work was September 30, 2000.

The delegate deemed Mr. Liggett's employment with Ruhan to be continuous after the lease was assumed from Larco, by virtue of the provisions of s. 97 of the Act. The delegate found there was no discussion of a performance bonus at the time the lease was transferred, and concluded that Mr. Liggett's wages, including the bonus, remained unchanged. The delegate found that the performance bonus constituted wages, as it was unrelated to hours of work, production or efficiency, and that he was thus entitled to the bonus after one year of employment with Ruhan.

The delegate also found that, because both the Pub and the Sports Bar were leased by Ruhan, there was no change in his employment, even though he was paid by Page. The delegate found that Mr. Liggett voluntarily decided to work fewer hours in September on a temporary basis to lighten Ruhan's financial burden, and that his employment was terminated on November 9, 2000, without notice or compensation.

The delegate determined that Mr. Liggett was owed 6 week's compensation for length of service. He also found that Ruhan failed to pay Mr. Liggett vacation pay for the period October 1, 1999 to June 15, 2000, and ordered that it do so.

ARGUMENT

Ruhan contends that the delegate failed to take into account relevant information, and arrived at the erroneous conclusion that it, rather than Page Marketing, was responsible to pay Mr. Liggett wages and vacation pay. It argues that Mr. Liggett was employed by Ruhan until June 15, 2000, and by Page Marketing until September 30, 2000. Mr. D'Souza contends that Mr. Liggett was "absorbed" by Page Marketing, and that Ruhan has no liability for wages or bonus.

Mr. D'Souza provided me with a document that showed that, on June 14, 2000, Mr. D'Souza, as sole shareholder of Ruhan, and Mr. Page, the sole proprietor of Page Marketing, entered into an agreement that Page Marketing would "assume all employees of the Black Tusk that stay at the Black Tusk and Ruhan Enterprises to assume all Jake & Elwood employees as of June 16, 2000". Mr. D'Souza and Mr. Page's evidence was that the enterprise would only be successful if Mr. Liggett ran the beverage part of the Pub, since Mr. Page had no background in that aspect of the operations. They said that Mr. Liggett was asked, and agreed, to go to work for Page. Mr. Liggett did not dispute this evidence. From that point, Mr. Liggett received paycheques from Page.

Mr. D'Souza also contends that, at the time Ruhan took over Larco, no bonuses were discussed, and that bonuses paid by Larco were discretionary and performance related. It says that it was unable to obtain any information from Larco on the payment of the bonus.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has been met.

The delegate found Ruhan responsible for the bonus payment based on the operation of s. 97 of the Act, by virtue of Ruhan's assumption of the lease of the premises from Larco. However, in my view, he did not satisfactorily determine who the employer was, nor did he address the relationship between Ruhan and Page. The delegate merely concluded that, because Mr. Liggett believed both businesses were owned by the same employer, they were. However, there is no dispute that Mr. Liggett received his paycheques from Page after June, 2000, took instructions with respect to duties and scheduling from Mr. Page, and received an ROE from Page. It appears from the evidence that, at the time Mr. Liggett's employment ended, he was working for Page, not Ruhan.

From the evidence, it is unclear to me whether Page and Ruhan were associated companies, as that is defined in s. 95 the *Act*. From the evidence, it appears that they may be. Mr. D'Souza and Mr. Page were business partners. It appears that Ruhan purported to sublet the Pub to Page. Many employees worked at both locations, including Mr. Liggett. There was no dispute that credit card transactions at the Pub went through Ruhan's account, and money to pay for draft beer at the Pub also came out of Ruhan's account. Mr. D'Souza contended that this arrangement was also to assist Mr. Page in getting his enterprise off the ground, but that Page was to account to Ruhan on a weekly basis. Finally, Mr. D'Souza's evidence was that Mr. Page agreed to assume responsibility to pay out all Mr. Liggett's holiday pay as part of their agreement to transfer the business.

On the evidence, it may be that both companies are responsible for Mr. Liggett's overtime and bonus payments, but further investigation is necessary to determine that. In any event, Mr. Page must be given the opportunity to present evidence on his own behalf, if that is the determination, which has not been done.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination dated October 2, 2001 be referred back to the delegate to address the issue of whether Page Marketing and Ruhan Enterprises are associated companies. If the answer to that issue is yes, further investigation and analysis as to the liability of the companies for wages and a bonus must be conducted.

Carol Roberts
Adjudicator
Employment Standards Tribunal