Employment Standards TRIBUNAL

An appeal

- by -

Nordel Restaurant Corp. operating as Burger King
("Nordel")

- 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

TRIBUNAL MEMBER: Alison H. Narod

FILE No.: 2004A/91

DATE OF HEARING: October 4, 2004

DATE OF DECISION: November 17, 2004

DECISION

OVERVIEW

This decision concerns an appeal pursuant to Section 112 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the "*Act*") by Nordel Restaurant Corp. operating as Burger King ("Nordel" or the "Employer"), of a Determination issued on February 13, 2004 by a delegate of the Director of Employment Standards (the "Delegate") in favour of Nordel's former employee, Ronald Klassen (the "Employee").

The Delegate found the Employer liable to pay the Employee unpaid annual vacation pay and compensation for length of service, plus interest and administrative penalties in amounts totalling $9,477.41 for contraventions of Sections 58 and 63 of the *Act*.

Nordel appeals the Determination. It says that an error was made with respect to the Employee's start date with Nordel; the Employee's length of service with Nordel was 4 years and 7 months and not the 14 years found by the Delegate. Therefore the Delegate's calculations of the Employee's entitlement to compensation for length of service and unpaid vacation are wrong. Moreover, it says the Employee subsequently found reasonable alternate employment with his previous employer. Therefore, he is not entitled to compensation for length of service. Finally, it says that the Employee received his full annual vacation entitlement in the year 2002.

ISSUES

The issues in this case are: whether the Employee is entitled to compensation for length of service and annual vacation pay; if so, what is the length of service with respect to which those amounts are to be calculated; and, in any event, whether the Employer is excused from payment either because it offered the Employee reasonable alternative employment or it is insolvent.

FACTS

There is no dispute that Mr. Klassen was employed by Nordel as a General Restaurant Manager up to May 31, 2003. Nor is there any dispute that he was not paid severance pay when his employment was terminated. The facts in dispute relate to when Mr. Klassen commenced employment with Nordel (as this affects the calculations of his compensation for length of service and the annual vacation pay) and whether he received all of the annual vacation pay to which he was entitled up to May 31, 2003. Additionally, there is a dispute as to whether the Employer provided "reasonable alternative employment" to Mr. Klassen by recommending him for his current employment with his previous employer.

The Delegate conducted an investigation/mediation, but not a hearing. My review of the record that was before the Delegate revealed that the Delegate had before him various materials including a Record of Employment and other pay records from Nordel stating that the Employee's start date was December 13, 1988. Additionally, the Delegate had before him a Record of Employment for the Employee issued by his prior employer, stating that he worked for that employer from May 26, 1991 to October 30, 1998, as well as the results of a search of the Corporate Registry indicating that Nordel was first incorporated on September 19, 1997.

In his Determination, the Delegate referred to all of the above-noted documents, save the documentation of the Corporate Search setting out the Employer's September 19, 1997 incorporation date. Because the corporate search raised questions about whether the Employee's employment could have commenced prior to the incorporation of Nordel, I caused a hearing to be held.

At the hearing, Nordel's representative, Michael Cuccione, and the Respondent, Ron Klassen, were largely in agreement over the historical facts. Apparently, Burger King Corporation first arrived on the B.C. scene in 1983. Franchisees began opening restaurants in the Lower Mainland. One group, which became known as Fraser Valley Restaurant Management Ltd., (also known as the "Fraser Valley Group"), was owed by two Americans, a father-in-law and a son-in-law, known as Dr. Goodwin and Mr. Foppiano. They opened a number of restaurants, at various locations. By the year 2000, they had five or six restaurants.

Mr. Cuccione joined the Fraser Valley Group in 1984 as a Manager and worked his way upwards through a number of positions until he became Director of Operations. Mr. Klassen was hired by the Fraser Valley Group as an hourly employee in 1986. On December 13, 1988, he was promoted to management and ultimately became a General Restaurant Manager at CGF's Scott Road restaurant. Mr. Klassen said that his paycheques, while at Fraser Valley, said Fraser Valley Restaurant Management on them.

In or about 1991 and 1992, the Fraser Valley Group restructured and all the restaurants, which at the time were each owed by separate corporate entities, were amalgamated into one company, which was thereafter known as CGF Restaurant Management Ltd. ("CGF"). Apparently, CGF required a Canadian operating partner and Mr. Cuccione was selected to fulfil that purpose. Accordingly, the share ownership of CGF was restructured so that Mr. Cuccione acquired 15%, Mr. Foppiano held 25% and Dr. Goodwin held 60% of the shares of the new company.

At some point, the father-in-law and son-in-law had a falling out and Dr. Goodwin took over Mr. Foppiano's shares in CGF. Additionally, at some point, in or before 1997, Mr. Cuccione and Mr. Foppiano became partners and began opening their own Burger King restaurants (known as the "Columbia Group"). Each of these restaurants was separately incorporated. By May 2003, there were four restaurants in the Columbia Group (a fifth had recently closed). One of these restaurants was located on Swenson Way in Delta and was owned by Nordel. At that time, Mr. Cuccione owed 51% of Nordel and was its President, while Mr. Foppiano owed 40% and was its Secretary. Dr. Goodwin was not involved.

Nordel was incorporated on September 19, 1997. A lease was entered for the Nordel restaurant and leasehold improvements were made. The restaurant opened in 1998.

Mr. Klassen was hired by Nordel in or about November of 1998. Mr. Cuccione, who was then still working for CGF, in addition to opening and operating restaurants in the Columbia Group, offered Mr. Klassen the opportunity to start a new restaurant. Mr. Klassen accepted.

Mr. Cuccione and Mr. Klassen disagree about whether or not Mr. Klassen was made aware that the new restaurant was owned and operated by a different group than CGF. Mr. Cuccione gave evidence that when he asked Mr. Klassen to open the new restaurant, he told Mr. Klassen that this was a new corporation. He said Mr. Klassen was also aware of this because he knew CGF had different stores than the Columbia Group. Moreover, he says that at each weekly management meeting, he did separate

reviews for the companies and of the month ends, in which all costs and charges were separated between CGF's restaurants on the one hand and the Columbia Group of restaurants on the other hand.

Mr. Klassen said that he did not recall the conversation he had with Mr. Cuccione when he was offered the job at Nordel. However, he recalled that Mr. Cuccione was aware that he, Mr. Klassen, was interested in opening his own restaurant. He said he was not clear that this was a different arrangement than before. He understood that both CGF and the Columbia Group were run out of the same office by the same person. Mr. Klassen said that his paycheques while at Nordel had Nordel's name on them.

Mr. Klassen said that the policy at CGF was that if management asked you to go from one restaurant to another, you went. However, Mr. Cuccione usually asked his opinion before he was sent to another restaurant. Mr. Klassen worked at almost every CGF restaurant.

Additionally, Mr. Klassen said that he never received a Record of Employment when he moved from one CGF store to another, nor did he receive a Record of Employment when he moved to Nordel. He said he was not given the Record of Employment recording his transfer from CGF to Nordel which Nordel gave to the Delegate and which lists Mr. Klassen's final day of employment with CGF as October 30, 1998. Mr. Cuccione did not dispute this.

On July 4, 2000, CGF terminated Mr. Cuccione. Mr. Klassen said that Mr. Cuccione advised his management staff at Nordel that he had been terminated by CGF. Mr. Klassen said that he knew at that point that these were two different groups of restaurant owners.

Mr. Cuccione acknowledged that during the time he worked for both CGF and the Columbia Group, both groups operated out of the same offices. They had centralized accounting, payroll and purchasing. After CGF fired Mr. Cuccione, CGF moved out. Subsequent to that time, there was no continuing relationship between the two groups.

On first employing Mr. Klassen, Nordel recognized Mr. Klassen's full service and vacation entitlement earned as a manager while employed by CGF, as if he had been hired by Nordel on December 13, 1988. By the time Mr. Klassen's employment was terminated, he was given 3 weeks vacation per year on the basis that he had been deemed to be a Nordel employee since December 13, 1988.

During the course of hearing, Mr. Klassen clarified that he took his full paid vacation allotment in each year he was employed by Nordel. He agreed that he took the vacation time approved by Mr. Cuccione on May 14, 2002 on the dates listed on that approval. He said he probably did not tell the Delegate that he received his full paid vacation in 2002. He said that in his claim, he did not intend to seek vacation pay for the time that he had received it. Rather, he claimed that he had not been paid vacation pay for 2002 and 2003, because he understood that he earned vacation in one year and was paid for it in a subsequent year. Accordingly, his claim is for the vacation he earned in that period of time (2002 to 2003) but did not take before he was terminated.

Mr. Klassen said that he was subsequently very briefly employed by another Burger King franchisee who was unrelated to Nordel. He does not know if Mr. Cuccione helped him get this job. He also said that after a few months of unemployment he obtained employment with CGF, but his ability to secure this job had nothing to do with Nordel.

ARGUMENT

The Employer filed its appeal on May 27, 2004. The Employer's allegations are summarized above and I will not repeat them here, except to note that the Employer argues that its records stating that the Employee's start date was November, 1998 reflect Mr. Klassen's start date with CGF as a manager and not his actual start date with Nordel. It says that it should only be responsible for paying compensation for length of service and for outstanding vacation pay calculated on the basis of Mr. Klassen's length of service with Nordel from and after November, 1998. It also says it enabled Mr. Klassen to subsequently obtain reasonable alternate employment by encouraging CGF to hire him. Additionally, the Employer says the Delegate erred by failing to recognize the business had closed. Moreover, it says, the business is insolvent and unable to pay the Employee's claim.

In Mr. Klassen's view, Mr. Cuccione had been his boss for twelve years. It did not matter whether the restaurants were owned by separate corporations. As far as he was concerned, they were all one. Additionally, he said his post-Nordel employment with CGF was not reasonable alternate employment because he obtained it for reasons unrelated to Nordel, he was unemployed for three months before CGF hired him, he started with CGF at a lower level as an Assistant Manager and he lost all his benefits in the process.

Written responses to Nordel's appeal were received from the Delegate. He did not appear at the hearing. With respect to the issue of compensation for length of service, the Delegate pointed out that the Employee's Record of Employment and the Employer's pay records each indicated Mr. Klassen's start date as December 13, 1988. The Delegate said that these records indicated there was no break in service. With respect to the issue of annual vacation pay, the Delegate said a new document the Employer appended to its appeal entitled "Vacation Time" was not provided during the investigation. The Delegate also said the Employer did not provide any response to the Delegate's pre-determination letter setting out his calculation of the annual vacation pay potentially owing. The Delegate says this new information should not now be admitted as evidence, because it was submitted after the investigation was completed.

ANALYSIS AND DECISION

New Evidence

The Employer seeks to rely on "new evidence" which it did not supply to the Delegate prior to the Determination. The evidence at issue is a document titled "Vacation Time" which sets out the Employee's choices of vacation in the year 2002 and indicates that the Employer approved certain of the Employee's choices on May 14, 2002. The Delegate objects to this "new evidence". In light of Mr. Klassen's clarification of his allegations, I have decided that it is not necessary to accept the evidence as the scope of the allegation has been limited by Mr. Klassen's clarification that he is not seeking compensation for the three weeks of paid vacation he received in 2002; rather, his allegation is that he did not receive, before his employment was terminated on May 31, 2003, a portion of the vacation pay he earned in the 2002-2003 period.

Compensation for Length of Service

The Employer's argument respecting compensation for length of service is essentially that the Delegate erred in his assessment of the evidence and adjudication of the facts. This allegation of error is more properly described as an alleged error of law. The Tribunal has adopted the following definition of "error

of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];

2. a misapplication of an applicable principle of general law;

3. acting without any evidence;

4. acting on a view of the facts which could not reasonably be entertained; and

5. adopting a method of assessment which is wrong in principle.

After reviewing the record that was before the Delegate, it is my conclusion that the Delegate committed an error of law by acting on a view of the facts which could not reasonably be entertained in light of the evidence before him.

The parties are diametrically opposed in their views as to the Employee's length of service. The Employee asserts that he was employed by the Employer for 14 years and relies on the start date contained in the Employer's documentation. The Employer says it treated the Employee as having the service CGF accorded him, but he in fact was not employed by Nordel prior to November 1998. In support of its position it relies on the above-noted Record of Employment issued to the Employee by CGF.

As noted, the Delegate referred to the evidence supplied by the Employee and by the Employer, but did not refer to the evidence the Delegate collected himself, namely the record of the Corporate Registry search showing that the Employer had first been incorporated on September 19, 1997. The Delegate found that the Employee's length of service was longer than the period of time that the Employer had been in existence as a corporate entity.

The Delegate provided no explanation as to how it could be concluded that the Employee worked for Nordel prior to its incorporation date in the face of the Record of Employment from the prior employer and the results of the Corporate Registry search.

Compensation for length of service under the *Employment Standards Act* is a minimum benefit provided by the *Act*. It is said to be a form of deferred contingent compensation intended "to compensate long-serving employees for the years of service and investment in the employer's business and for the special losses they suffer when their employment ends" (see *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27). Since it is a service-based benefit, the amount of compensation for length of service payable by an employer increases in lock-step with an employee's tenure. This differs from damages an employer may owe an employee for failure to give proper notice of termination. In the latter case, proper notice will be determined either by an express provision in the contract of employment setting out the amount agreed to be paid in the event of termination or, in the absence of an express contractual term, by the principles of "reasonable notice" which are implied into the contract of employment (*Sitter (Re)*, [2000] B.C.E.S.T.D. No. 515, at paras. 10 to 11).

Although an employee may be entitled to make a claim in court for damages from an employer for failure to provide notice in accordance with an express notice provision or in accordance with the principles of "reasonable notice", this type of claim differs from an employee's statutory entitlement under s. 63 of the *Act* to compensation for length of service. Under the *Act*, the Delegate is not entitled to make an award of damages. Rather, a Delegate is required to determine an employee's entitlement to compensation for length of service in accordance with the provisions of the *Act*.

The amount of compensation payable under the *Act* is based entirely on an employee's length of service with an employer. This length of service, for the purposes of the *Act*, is not extended by the mere fact that an employer may recognize an employee's prior service with another employer (although that fact may be relevant to a claim for damages in court for failure to provide proper notice).

However, an employee's length of service under the *Act* may be extended to include service with another employer where the employer is either a "successor" to another employer under s. 97 (because the employer acquired all or part of the business or assets of another company) or where the employer and another company are deemed to be "one employer" under s. 95 (because the two businesses are under common control or direction).

The Delegate did not address whether Nordel was a successor to or "one employer" with CGF. The facts in the instant case do not suggest that Nordel was a successor to any other employer. They may suggest that at some point in time Nordel and CGF were "one employer", although they do not suggest they were at the time Mr. Klassen's employment was terminated. However, the Tribunal's jurisprudence is clear that where the Delegate has not made a finding that the two companies are "one employer", the Tribunal is unable to make that finding in the Delegate's place (*Re 54809 B.C. Ltd.*, [1999] B.C.E.S.T.D. No. 60 and *Re Trattoria Pasta Shoppe Ltd.*, [2003] B.C.E.S.T.D. No. 331).

In short, in the present case, the Delegate determined that the Employee's length of service was longer than his tenure with the corporate entity that terminated him without addressing whether or not extending that length of service before the date of the Employer's incorporation was justified for a reason permitted by the *Act.* In the absence of such a justification, I must cancel the Delegate's Determination respecting s. 63 and send the matter back to the Delegate for re- determination.

Reasonable Alternate Employment

According to Section 65(1)(f) of the *Act*, an employer is not obliged to provide compensation for length of service to an employee who has been offered and has refused reasonable alternative employment by "the employer".

I agree with the Delegate's conclusion that the Employee's post-Nordel employment with an entity unrelated to Nordel is not the type of "reasonable alternative employment" that relieves Nordel of this obligation.

The Employee's post-Nordel employment with other unrelated employers was not "reasonable alternative employment" offered by the Employer.

Closure of Business and Insolvency

As noted, the Employer contends that the Delegate erred by failing to recognize that the Employer's business had closed. That fact, I find, is not relevant to the issue of whether and to what extent the Employee is entitled to compensation for length of service and annual vacation pay.

Additionally, the Employer asserts that it is insolvent and unable to pay Mr. Klassen's claim. With respect to the issue of insolvency, an employer may be relieved of the obligation to pay compensation for length of service under s. 63 if its former employee was employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under Section 427 of the *Bank Act* (Canada) or proceedings under an insolvency act (s. 65(1)(d)).

In the instant case, there is no evidence that the employer is under receivership or is subject to formal bankruptcy or insolvency proceedings. Accordingly, the Employer might be excused from paying compensation for length of service if it could demonstrate the Employee was employed under an employment contract that was impossible to perform due to an unforeseeable event or circumstance. In my view, the fact that the franchisor, Burger King, terminated its franchise relationship with Nordel is not the type of "unforeseeable event or circumstance" that would excuse Nordel from its obligations under the *Act*. Termination clauses are typical features of franchise agreements. It is difficult to accept the suggestion that Nordel's principals were unaware that their franchise relationship was in jeopardy.

The evidence at the hearing indicated that one of the restaurants in the Columbia Group had recently closed due to non-profitability and, according to Mr. Cuccione, the franchisor's lawyer at the time expressed the hope that, now that that restaurant had closed, the balance of the restaurants would be profitable sooner. There is no suggestion that Burger King was not within its rights to terminate the relationship. Accordingly, it can be inferred that the restaurants were financially unprofitable and in jeopardy of closing. Therefore, the potential for future closures was not unforeseen.

In this regard, I agree with the comments of Adjudicator Westphal in *M.J.M. Conference Communications of Canada Corp.* [2004] B.C.E.S.T.D. No. 182, at para. 22, that "the exception in s. 65(1)(d) does not apply simply because an employer has ceased operations as a result of a deterioration in its business, because such misfortune is foreseeable." Similarly, in my view, termination of a franchise agreement because of a deterioration in the franchisee's business, is foreseeable.

Annual Vacation Pay

For the reasons set out above under the heading "Compensation for Length of Service", I conclude that the Delegate committed an error in law in finding that the Employee had been employed by the Employer prior to November 1998. Additionally, I note that Mr. Klassen's claim has been further clarified to exclude the three weeks' vacation pay he received in 2002. Accordingly, I cancel the Delegate's Determination with respect to the calculation of annual vacation pay owed under s. 58 and remit it back to the Delegate for further investigation and determination in accordance with these reasons.

ORDER

Pursuant to s. 115 of the *Act*, I order that the Determination dated February 13, 2004 be cancelled and referred back to the Delegate to further investigate and determine the Employee's entitlement to compensation owing by the Employer for length of service and for unpaid vacation in accordance with these reasons.

Alison H. Narod
Member
Employment Standards Tribunal