

An appeal

- by -

Medhi Najari
("Najari")

- 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: M. Gwendolynne Taylor

FILE No.: 2003/27

DATE OF DECISION: August 27, 2003

DECISION

OVERVIEW

I conducted an oral hearing on October 22 and November 23, 2001, as a result of an appeal filed by Mehdi Najari ("Najari"). In the Determination issued on July 13, 2001, the Director of Employment Standards (the "Director") had found that Najari had been terminated for just cause and dismissed Najari's complaint. I found that he had not been dismissed for just cause and cancelled the Determination. One of the issues that I could not determine based on the evidence before me, was whether sections 95 or 97 of the *Act* applied and, thus, whether the employment was continuous. This would affect the amount of compensation Najari was entitled to receive, and the determination of who was the responsible employer.

By decision dated January 23, 2002, I referred this appeal back to the Director with the following directions:

I cancel the Determination dated July 13, 2001 and refer this case back to the Director for determination of the length of Najari's employment and the amount of compensation due, pursuant to section 63 of the *Act*; and which company is responsible for the compensation.

In response to the referral back, the Director provided a report dated April 25, 2003. I have reviewed the submissions made in response to that report and I adopt the reasoning and conclusions in the report, for the reasons that follow.

For a more detailed review of the facts, please refer to my previous decision. Briefly, the facts are that Najari worked at the Villages Med Grill restaurant for 13 years. On December 8, 2000, the restaurant was forced into insolvency. The creditors asked the landlord, 618865 B.C. Ltd., to keep the restaurant open, which it did as of December 8, 2000. 618865 had the employees sign temporary employment contracts which purported to establish entirely new employment, unrelated to the previous employment by Med Grill Restaurants. Najari's employment was terminated on January 9, 2001 by an employee of 618865. The Med Grill Restaurant resumed operation of the restaurant on approximately January 18, 2001 and shortly thereafter, re-hired Najari.

As noted above, I found that Najari was not fired for just cause. Accordingly, he would be entitled to compensation under s. 63 of the *Act*, if he had been employed for 3 consecutive months. On my referral back, the Director undertook further investigation and concluded that 618865 B. C. Ltd. had assumed control of the restaurant business, including the assets, the goodwill, and the employees. 618865 ran the business and had the opportunity to profit from the business. 618865 also terminated Najari's employment. The Director concluded that s. 97 applied to the takeover of this restaurant with the result that Najari's employment was deemed to be continuous. The Director also considered the effect of the temporary employment contracts and concluded that it would be inconsistent with the intention of s. 97 to give effect to the contracts to negate continuous employment. The Director found that the contracts were null and void under s. 4, as an attempt to waive a requirement of the *Act*.

During the time this appeal has been under consideration, 618865 B. C. Ltd. has changed its name to Villages Pizza (CCQ) Inc. The Director found that 618865 (now Villages Pizza (CCQ) Inc.) was Najari's employer at the time of his termination, that Najari was entitled to 8 weeks compensation in lieu of notice,

and calculated the amount owing based on Najari's evidence, \$3,392.00, plus interest of \$400.77, for a total of \$3,792.77.

SUBMISSIONS

Counsel for Villages Pizza (CCQ) Inc. submitted that payroll documents showed that Najari was employed on January 18, 2001. The former employer Med Grill Restaurant had taken over as of that date and, according to the Director's reasoning, would have become the employer and would be responsible for any severance owing to Najari. Additionally, since that indicates only 7 days of unemployment, the claim for lost wages should be reduced to one week.

Najari responded to this submission noting that he did not work on January 18, rather that was the date Med Grill Restaurants issued a cheque for his last pay period, November 27 to December 7, 2000. The proprietor of Med Grill Restaurants also responded with this same explanation.

DECISION

It is apparent that counsel for Villages Pizza (CCQ) Inc. misunderstood the document concerning the January 18, 2001 cheque. I accept the evidence of Najari and Med Grill Restaurants on this point.

In my view, the Director conducted a thorough investigation and gave the parties ample opportunity to make submissions on the various issues. The Director's reasoning for applying section 97 has not been challenged. I find that the Director employed the best evidence available to arrive at the amount of compensation owing. I find that the Director's conclusions are well supported by the facts and the legislation.

ORDER

Pursuant to section 115 of the *Act*, I Order Villages Pizza (CCQ) Inc., formerly 618865 B. C. Ltd., to pay to the Director of Employment Standards, on behalf of Mehdi Najari, the sum of \$3,392.00 for compensation in lieu of notice, plus interest of \$400.77, for a total of \$3,792.77, plus any additional interest that the Director determines is owing to the time of payment.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal