



An appeal

- by -

Top Gun Entertainment Ltd., 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
(Corporations associated with Top Gun Bowling Investments Ltd.
under section 95 of the Employment Standards Act)

- 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: Lorne D. Collingwood

FILE No.: 2001/612

DATE OF DECISION: October 15, 2001

DECISION

OVERVIEW

The appeal is pursuant to section 112 of the *Employment Standards Act* (“the *Act*”) and 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 (I will refer to the companies as “the Ten Companies” and “the Appellant”). The Ten Companies appeal a Determination issued on June 14, 2001 by a delegate of the Director of Employment Standards (“the Director”). In the Determination (“the section 95 Determination”), it is decided that the Ten Companies, Top Gun Entertainment Ltd. and Top Gun Bowling Investments Ltd. are associated companies and that the Director will treat the companies as one person and the employer for the purposes of the *Act*.

The appeal was delivered to the Tribunal after the statutory period for an appeal of the section 95 Determination had expired. The Appellant has asked that the Tribunal extend the time limit for the appeal. I find that there is no compelling reason to do so.

This case has been decided on the basis of written submissions.

ISSUE TO BE DECIDED

The sole issue before me is whether the Tribunal should or should not exercise its discretion to extend the time period for appealing the section 95 Determination. The appeal is said to be late because the Appellant gained an extension of the time limit for the appeal, wrote to confirm a second extension, and was waiting to see if there were not a way to settle matters. According to the Appellant, once it was realised that there was no chance of a settlement, the appeal was promptly filed.

FACTS

The Director issued a Determination against Top Gun Bowling Ltd. (“Top Gun”) on March 27, 2001. In that determination (“the Corporate Determination”), Ronald Corby, Kinman Dang, Dianne Kuiack, Hari Narayan and Akihito Takimoto are awarded wages, a total of \$15,663.83 including interest.

The Corporate Determination was appealed and a settlement officer was assigned to the case. The file number of that appeal is 2001/304.

While the officer was attempting settlement of the Corporate Determination, the Director issued the section 95 Determination (Tribunal File Number 2001/612). Contained in that decision is clear notice that there was a deadline for appeals. The deadline for an appeal of the section 95 Determination was said to be July 9, 2001. That date is consistent with the time period for filing appeals which is set by statute, namely, 15 days.

July 9 came and went without there being an appeal of the section 95 Determination. It was not until August 27, 2001 that the appeal was filed.

It is suggested that the Ten Companies, through Top Gun, received an extension of the time allowed for the appeal. In that regard, the Appellant is not referring to any letter from the Tribunal but a letter that Top Gun sent the Tribunal on July 3, 2001. In the outset of that letter, Top Gun indicates that it wants to settle matters with the employees. But Top Gun, at the end of the letter, makes the following statement:

“We understand that you agreed to extend the deadline of the appeal of the Determination dated 14, June, 2001 from 9 July, 2001 to 30 July, 2001 due to the negotiation of the above settlement. ...”

In that the letter is in clear reference to the section 95 Determination, it speaks of “we”, and the Tribunal did not issue anything to the contrary, it appears that the Ten Companies may well have been led, rightly or wrongly, to believe that they had until July 30, 2001 to appeal. However, July 30, 2001 came and went without anything being heard or received from the Ten Companies. Indeed, nothing was heard or received from the Appellant prior to August 27.

According to the Appellant, it, by letter dated July 23, 2001, wrote to confirm a further extension of time limits. I find that it did not.

The Appellant refers to a letter from Top Gun. There is nothing about that letter which would lead one to believe that Top Gun was representing the Ten Companies. All that Top Gun does is ask if the Tribunal would “kindly extend the appeal deadline of the said Determination to 30 days after your (the Tribunal’s) confirmation of the cancellation of the settlement proposal”. Most importantly, the letter is clearly and obviously in reference to Tribunal File Number 2001/304, in other words, the Corporate Determination. It makes no mention of the section 95 Determination or the Ten Companies. I do not, as such, find that Top Gun’s letter is a request for an extension of the time limit for an appeal of the section 95 Determination.

I am not shown a letter by which the Tribunal in any way indicates that it is prepared to extend the time limit for the appeal.

As I understand the appeal, it is as follows:

- It claims that the section 95 Determination is invalid because the employees did not file complaints against the Ten Companies in the time limit allowed;

- it argues that the section 95 Determination is invalid because, contrary to section 77 of the *Act*, the Director did not offer the Ten Companies an opportunity to respond during the investigation;
- it argues that the section 95 Determination is invalid because the Corporate Determination had already been issued and the employees are unable to commence another proceeding except as allowed by section 82 of the *Act*;
- it argues for one decision over two, one which includes the names of all parties and associated companies and it argues that, if there is to be more than one determination, it is certainly improper to issue a second determination before the Tribunal is finished with the Corporate Determination;
- it claims that as the Corporate Determination is in error, the section 95 Determination is unnecessary;
- it complains that the position of the employees changes from one determination (the Corporate Determination) to the next (the section 95 Determination);
- it suggests that the section 95 Determination is in error because the delegate did not summarize all statements made by Albert Leung on December 12, 2000 but, it does so I find, without ever explaining why it is necessary to do so;
- it claims, but does not submit evidence to show, that the directors and officers of the Ten Companies are not as set out in the section 95 Determination and that the Ten Companies have different controlling shareholders and directors;
- it argues that it does not follow from the fact that some of the directors and officers of the Ten Companies are related to each other, some by marriage, that the businesses are associated corporations;
- it claims that the “Top Gun Group” is not a legal entity;
- it claims that Top Gun is quite independent from the Ten Companies but it produces only evidence which is to the contrary, the fact that it is Top Gun that speaks for the Ten Companies;
- it argues that the mere fact that companies use the same logo, the same accountants and the same management company, does not mean that they are associated companies under the *Act*;
- it claims but does not show that the employees were not paid by any one of the Ten Companies;
- it claims but does not show that Top Gun and the Ten Companies are not under common control;
- it is a complaint that the delegate changed his mind without notice or further discussion even though he was on December 12, 2000 told that the Ten Companies were not under common control or direction;

- it is suggested that the employees will end up being paid twice because the section 95 Determination does not indicate that it supersedes the Corporate Determination and, last but not least,
- it is suggested that the section 95 Determination is “too rough and nonsense” because it does not indicate how the amount of the Corporate Determination is to be shared by the Ten Companies.

While it is argued that the Ten Companies did not have an opportunity to respond during the investigation, I find that the delegate in fact heard from both Albert Leung and Top Gun. Albert Leung was found to be the registered Secretary of Tregunter Holdings Ltd. (“Tregunter”), the President of 589934 B.C. Ltd. and Granville Sushi and a director of MB Techno and T.B.W. Investments Ltd.. Top Gun is representing the Ten Companies on appeal.

The Director objects to an extension of time limits on the basis that it is not explained why the appeal is late and because the section 95 Determination is fully consistent with information obtained from the Registrar of Companies in regard to the registered officers and directors of the Ten Companies. The Director does not argue that an extension of time limits is prejudicial.

ANALYSIS

Section 112 of the *Act* establishes a 15 day period for appealing Determinations.

- 112** (1) Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.
- (2) The request must be delivered within
- (a) 15 days after the date of service, if the person was served by registered mail, and
 - (b) 8 days after the date of service, if the person was personally served or served under section 122 (3).

The Tribunal may dismiss an appeal without holding a hearing if it is satisfied that the appeal is not in time, the appeal is not within the Tribunal’s jurisdiction, or the appeal is frivolous, vexatious, trivial or not in good faith. The Tribunal may also extend the time limit for filing an appeal.

- 114** (1) The tribunal may dismiss an appeal without a hearing of any kind if satisfied after examining the request that
- (a) the appeal has not been requested within the time limit in section 112 (2),
 - (b) the appeal is not within the tribunal’s jurisdiction, or

(c) the appeal is frivolous, vexatious or trivial or is not brought in good faith.

109 (1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:

...

(b) extend the time period for requesting an appeal even though the period has expired;

....

The statutory period for appeals will not be overridden lightly but only where there is a compelling reason to do so. Where there is a reasonable explanation for the failure to file the appeal in time, no actual prejudice to the other parties, and it appears that there is a serious issue to address, I am satisfied that the Tribunal should not deny an appellant access to the Tribunal but that it should accept an appeal that is late. That being said, however, I am satisfied that the Tribunal should be more inclined to extending the time limit for an appeal where the appeal is only late by a few days and far less inclined to accepting the explanation for why the appeal is late where deadline is missed by a wide margin.

There is not a compelling reason to extend the time limit for the appeal in this case. The appeal is seven weeks late. There is not a reasonable explanation for the fact that the appeal is late. And there is not a serious issue to address.

It is not for reason of any letter from the Tribunal that the Appellant made the mistake of thinking that it had until the 30th of July in which to make the appeal.

If the Appellant was in fact led to believe that it had until the 30th of July in which to file the appeal, that could only explain why the appeal was not filed before that point. It hardly explains why it was not until the 27th of August that the Ten Companies got around to filing the appeal. There is simply no explanation for that long delay.

While an appellant may request an extension of the time limit for an appeal, the Tribunal will not grant such an extension unless there is a compelling reason to do so. In this case, there is both no request to extend time limits, nor does the Appellant provide any good reason for such an extension.

The Appellant claims that it was waiting to see if there was not some way that the Corporate Determination could be settled. I fail to see how that is a reason to delay the appeal. The issues are quite separate. The idea that the Ten Companies were waiting to see if matters could be settled is nothing more than a weak excuse. As I see it, the appeal is such that it could easily have filed within the statutory period for an appeal of the section 95 Determination.

I fail to see how there is a serious question to address in this case. There is nothing in the Appellant's long list of claims and complaints that leads me to believe that the section 95

Determination may contain a serious error in fact or in law. Much of the appeal reflects a failure to understand the *Act*. For example, the Appellant fails to realize that in issuing the section 95 Determination, the Director is acting on her own motion.

76 (3) Without receiving a complaint, the director may conduct an investigation to ensure compliance with this Act.

The appeal consists of a number of claims for which there is absolutely no support. There is nothing technically wrong with the delegate's decision to issue the section 95 Determination as and when it did. In reading the appeal, I find that the Appellant fails to make a coherent case for cancelling or varying the section 95 Determination, or sending any matter back to the Director.

ORDER

I order, pursuant to section 114 (1) (a) of the *Act*, that the appeal be dismissed on the basis that it is out of time and the Appellant has failed to produce a compelling reason to extend the time limit for the appeal.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal