Employment Standards TRIBUNAL

An appeal

- by -

Top Gun Bowling Investments Ltd.
("Top Gun")

- 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.: 2001/304

DATE OF DECISION: November 15, 2001

DECISION

OVERVIEW

The appeal is by Top Gun Bowling Investments Ltd. (referred to as "Top Gun" and "the Appellant" in this decision) and pursuant to section 112 of the *Employment Standards Act* ("the *Act*"). Top Gun appeals a Determination issued on March 27, 2001 by a delegate of the Director of Employment Standards ("the Director"). In that Determination, Top Gun is ordered to pay compensation for length of service to Ronald J. Corby, Kinman Dang, Dianne Kuiack, Hari Narayan and Akihito Takimoto, a total of $15,456.27 interest included.

Top Gun, on appeal, claims that it did not employ any of the above five people. According to Top Gun, they were employed by Top Gun Entertainment Ltd.

The Appellant also objects to the Determination for other reasons. It has many complaints. Among them is a complaint that it was not given an adequate opportunity to respond and argument that the order to pay length of service compensation is wrong because an unforeseeable event or circumstance made it impossible to perform the employment contract.

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

ISSUES TO BE DECIDED

Top Gun claims that it did not employ Corby, Dang, Kuiack, Narayan or Takimoto.

It is said that the Determination should not have been issued because

a) Takimoto's complaint was filed outside of the time period for such a complaint,

b) the delegate's investigation was insufficient,

c) the employer did not have a sufficient opportunity to respond to the investigation, and

d) the delegate failed to assist in settling matters and failed to give Top Gun time to settle matters on its own.

In regard to the above four points, the Appellant protests that it is insufficient and unfair to make only one visit to an employer. It goes on to explain that it considers the investigation to have been insufficient, and the opportunity to respond insufficient, because it was not given a genuine chance to settle the complaints.

> "The Officer … agreed to allow time for the employer to negotiate and handle the settlements. Then, there was no contact or further investigation from the Officer.

> However, Top Gun was shocked to receive the Determination in March 2001 without any verbal or written notice of the termination of the negotiation period. It is unfair to Top Gun and the employer due to the insufficient response opportunity."

The Appellant argues that section 63 of the *Act* does not apply because the employment contract was impossible to perform due to an unforeseeable event or circumstance. The Appellant also claims that it is unfair that employees, who are victims of the unforeseen event or circumstance, are able to require an employer, also a victim of that event or circumstance, to pay length of service compensation. According to the Appellant,

> "There are many events or circumstance, which can make the business closed, such as fire, accident, earthquake, riot, war, wrongful suspension by government authorities or wrongful termination of the lease, etc.. No people can predict or avoid any unreasonable claim, unexpected hazard or unexpected accident (… "external factor"). If the external factor occurs and makes the business close and cannot be re-open" (re-opened), "it is unfair that the employer is still liable for the notice of termination.
>
> Top Gun cannot avoid any unreasonable claim and complaint from the outsiders. This is similar to unpredictable fire accident or earthquake hazard … , the operation could not be re-open" (re-opened) "due to the damages of the fire or earthquake. The close of the business was not planned or initiated by either the employer or the employee. Both employer and employee are victims of this unforeseeable event caused by the external factor. The employees lost their jobs and the employer lost the business. They all suffer from the accidental hazard or unforeseeable event and circumstance."

Should I find that Top Gun is the employer, and that section 63 does apply, the following is then at issue:

- Top Gun claims that it is unreasonable and unfair for the Director to expect notice of termination because it was not in a position to serve such notice. In that regard, Top Gun claims that it was locked out of its office.

- Whether the amount of the Determination may be reduced for reason of the following:

    1. The many employment opportunities which Top Gun created in Vancouver;
    2. the fact that employees were paid on time if not in advance;
    3. the fact that employees received loans at no interest;
    4. because the employer did not take advantage of the employees but paid them to the date of the bowling alley's closure; and/or

5. the fact that neither Top Gun, nor Top Gun Entertainment Ltd., has much in the way of assets.

- The Appellant claims that the delegate's calculations with respect to Narayan are incorrect. According to the Appellant, Narayan is owed only $1,614.80.

What I must ultimately decide is whether the Appellant has or has not shown that the Determination ought to be varied or cancelled, or a matter referred back to the Director, for reason of an error or errors in fact or law.

FACTS

Corby, Dang, Kuiack, Narayan and Takimoto ("the employees") worked at the Top Gun bowling centre. All five were terminated without notice on July 6, 2000.

The employees indicated, at the investigative stage, that they were paid by different corporations but it was Top Gun that did the hiring. The delegate reports that he contacted Top Gun and that he spoke to Albert Leung, one of Top Gun's directors. According to the delegate, Leung "did not draw any distinctions between Top Gun Bowling Investments Ltd. and Top Gun Entertainment Ltd." but treated "employees at the bowling centre and the employees at the related restaurant, Top Win Café Ltd. … as one whole group of employees". As I see it, it is not until the appeal that Top Gun begins to claim that it is not the employer.

Top Gun, on appeal, claims that it is Top Gun Entertainment Ltd. ("Entertainment") that is the employer, not Top Gun Bowling Investments. It does not produce clear proof of that, however, nor does it explain the importance of this line of argument. All that I am shown is that Entertainment is listed as the employer on the Record of Employment ("ROE") for each employee. It does not submit paycheques, pay stubs, correspondence, or employment contracts, indeed, any evidence to establish which company is the employer. It has, most importantly, been decided that Entertainment, and Top Gun, and ten other companies, namely, 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 these companies as "the ten companies") are one person and the employer pursuant to section 95 of the *Act*, in other words, merely parts of what is the actual business whole. That is done through a determination dated June 14, 2001 and, I note, that decision is now final. The decision was not appealed by Entertainment. It was appealed by the ten companies but the appeal was late and it was decided, by me, that the Tribunal would not extend the time limit for the appeal as there was no compelling reason to do so [See *Tregunter Holdings Ltd. et al*, BCEST No. D539/01].

I find that the Appellant is merely wondering out loud whether Takimoto's complaint is outside of the six month statutory time period for the complaint. It does not present evidence which shows that the complaint is late.

The bowling centre was located in premises which were leased. Top Gun was locked out of the bowling alley by the landlord on July 6, 2000 and with that the bowling centre closed. Prior to that, there had been discussion of a new lease (an agreement to lease for a further term) and a dispute over the rent to be paid. It was Tregunter Holdings Ltd. that sought to renew the lease, acting on Top Gun's behalf. The negotiations were over a period of a year. A letter dated July 10, 1999 complains of the failure of Fairchild Developments Ltd. to respond to Top Gun's stated interest in renewing the lease. In a letter dated September 17, 1999 Top Gun denies that it is behind in its lease payments. A letter dated October 28, 1999 indicates that Top Gun was seeking a reduction in minumum rent. The Appellant also produces two letters dated June 30, 2000 which indicate a dispute over what was to be paid in the way of "additional rent" and that Top Gun was at that time paying only "minimum rent", signage and GST.

Top Gun complains that, contrary to what one would believe from the Determination, it did not accept that it was liable for compensation for length of service. I am prepared to accept Top Gun on that point.

Top Gun claims that if Narayan is entitled to length of service compensation, it is only $1,614.80 that he is owed, vacation pay and interest included. The Appellant does not provide an explanation of why that might be so, however. I find that it merely pulls figures out of thin air.

ANALYSIS

The Appellant complains of a failure to investigate matters properly. In that regard, the Appellant claims that the delegate visited the employer on only one occasion. And it complains that the delegate did not assist in settling matters, nor give Top Gun enough time to settle matters on its own. It is for reason of the latter that the investigation is said to be insufficient and the opportunity to respond is said to be inadequate.

I find there is in fact no evidence to support a conclusion that the delegate's investigation is in any way inadequate, improper or unfair. The Appellant is mistaken in its belief that the Director must, in each and every case, act to settle matters. That is not what the *Act* requires. A delegate may assist in settling matters but the Director is not required to provide such assistance.

> **78** (1) The director **may** do one or more of the following:
> (a) assist in settling a complaint or a matter investigated under section 76;
> (b) arrange that a person pay directly to an employee or other person any amount to be paid as a result of a settlement;
> (c) receive on behalf of an employee or other person any amount to be paid as a result of a settlement. (my emphasis)

It is use of the word "may" that signifies that the power to assist in settling complaints is discretionary.

It is suggested that the delegate promised Top Gun a certain amount of time in which to settle matters and Top Gun complains that it was given insufficient time to achieve settlements. But I find no obvious fault here. There is not evidence to establish a broken promise as is alleged. And the *Act* does not require the Director to give the employer a opportunity to negotiate settlements.

I am not shown that Top Gun was denied the opportunity to be heard. The right to be heard does not include a right to help with settlements or any right to be allowed a chance to settle matters. It is clear that the delegate advised Top Gun of the basic nature of his investigation and that he gave Top Gun a chance to respond. And the opportunity to respond appears both fair and reasonable given the issues and given the requirement that delegates proceed in an efficient manner. The latter is a purpose of the *Act*.

> **2** The purposes of this Act are as follows:
> …
> (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act; …

Top Gun was contracted by the delegate, indeed, he went so far as to pay the employer a visit. It was then open to Top Gun to raise new issues and submit evidence through correspondence and/or by telephone. Apparently, it did not do so. As such, it seems to me that the delegate had every reason to believe that each of the complaints was straightforward and that there was nothing further to investigate, at least, in regard to the complaints themselves.

Now that the Director has issued the determinations that she has, it is clear that Top Gun has much to say on the matter of whether it should be forced to pay compensation for length of service. The Tribunal has said, however, in decisions like *Tri-West Tractor Ltd.* (BCEST No. D268/96) and *Kaiser Stables Ltd.* (BCEST No. D058/97, that it will not normally allow an appellant to raise issues or present evidence which could have been raised or presented at the investigative stage. In *Tri-West*, the principle is stated as follows:

> "This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. … The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process."

The appeal, aside from the above complaints, all of which go to the adequacy of the investigation, is in my view nothing more than an attempt to make a case that could have been

made at the investigative stage but was not. And I am satisfied that it may be dismissed on that basis. But I am also satisfied that this appeal is one which has no hope of succeeding.

It is claimed, on appeal, that it is Entertainment that is the employer of Corby, Dang, Kuiack, Narayan and Takimoto. The Appellant does not produce evidence to show that, however. And the Director has, in any event, decided that Entertainment and Top Gun, and ten other companies, are in effect a single business entity and one person and the employer pursuant to section 95 of the *Act*. It is no longer important whether it is Entertainment or Top Gun that acted as the employer of the above five employees. The Director has pierced the corporate veil and decided that the two companies, and ten other companies, are one and the same for the purposes of the Determination.

It is suggested that Takimoto's complaint is out of time but the Appellant does not produce evidence to show that. I note, moreover, that the Director does not require a complaint but may act on her own motion.

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

It is argued that the amount of the Determination should be reduced because Top Gun has generated employment for people, it has been good to its employees in several ways and it has almost no assets. That line of argument has no hope of succeeding because the *Act* does not bestow a power on the Director or the Tribunal to reduce a determination for reason of an inability to pay or good behaviour. The Director and the Tribunal are charged with a responsibility to apply the law such that employees receive the basic, minimum standards of the *Act*.

The Appellant claims that the Determination awards Narayan an incorrect amount of money but, as noted above, the Appellant fails to show that the amount awarded Narayan is wrong. It simply pulls figures out of thin air. Absent clear reason to vary the amount awarded Narayan, there is no reason to vary or cancel the Determination in respect to amount awarded.

The Appellant claims that it is unfair and unreasonable to expect notice in this case because Top Gun did not have access to its office. But it is not until the point of termination that the employer was locked out of its office. It was by then too late to issue notice of termination. Notice of termination is in advance of termination.

The only part of the appeal that is of any substance is argument that section 63 does not apply for reason of an exemption listed in section 65.

Section 63 is as follows:

> **63** (3) The liability is deemed to be discharged if **the employee**
> (a) **is given written notice of termination** as follows:

(i) one week's notice after 3 consecutive months of employment;
(ii) 2 weeks' notice after 12 consecutive months of employment;
(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just cause.

Section 63 of the *Act* establishes a statutory liability on the employer to pay length of service compensation to employees. This is not a case where the liability to pay such compensation has been discharged because written notice of termination was issued, the compensation was paid or the employees acted to terminate their employment, retired or were dismissed for just cause. It follows, normally, that the employer must in such circumstances pay length of service compensation.

In this case it is said that section 63 does not apply for reason of one of section 65's exceptions, namely, the state where it is impossible for the employer to continue the employment because of some unforeseeable event or circumstance. Section 65 is as follows:

65 (1) Sections 63 and 64 do not apply to an employee

…

(d) 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 a proceeding under an insolvency Act, …

According to the Appellant, the unforeseeable event is its eviction from the building in which it operated.

I accept that Top Gun was unable to renew its lease on terms acceptable to it, that the landlord moved to evict Top Gun from its place of operations and that the eviction was to some extent unforeseeable. But that failure to renew and the eviction are not what I am able to view as an unforeseeable event or circumstance as the term "unforeseeable" is used in 65(1)(d) of the *Act*. Section 65 is an exception and as such it must be interpreted narrowly. In my view, section 65(1)(d) is meant to apply only to events and circumstances that are completely unforeseeable, such as a major earthquake or other "act of God". As the Tribunal has said in *ARFI Holdings Ltd.* , BCEST No. D054/97,

> The word "unforeseeable" should be interpreted cautiously. It would seriously undermine the minimum protections given employees by the *Employment Standards Act* to deny them length of service compensation when their employer

> encounters a difficulty in the marketplace, be it a product market or a real estate market.

It is also clear to me that an eviction caused by a failure to reach an agreement on a lease or a dispute over rent is largely foreseeable. The lessee (in this case, Top Gun) knows the date when its lease expires. The lessee will in most cases know the nature of the landlord's new proposal. The lessee knows what is its ability to pay. Where there is negotiation of a new lease (a lease for a further term), the lessee is soon in a position to assess where the negotiations are headed and the probability of whether the lease can be renewed. And it is obvious that the lessee has only four basic options: Satisfy the landlord, move, close or face the possibility of eviction. Top Gun's eviction is the predictable result of its failure to pursue its three other options.

The delegate is correct. The employees are covered by section 63 of the *Act* and they are entitled to be paid compensation for length of service. Top Gun's complains that it is unfair to force it to pay such compensation given all that has happened but, if so, its complaint is with the *Act* itself, not the Determination.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated March 27, 2001 be confirmed in the amount of $15,456.27 and to that I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal