Employment Standards TRIBUNAL

An appeal

\- by -

Top Win Café Ltd.
("Top Win")

\- 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.:** 2001/305

**DATE OF DECISION:** November 27, 2001

# DECISION

## OVERVIEW

The appeal is by Top Win Café Ltd. (referred to as "Top Win", "the employer" and also "the Appellant") and pursuant to section 112 of the *Employment Standards Act* ("the *Act*"). Top Win appeals a Determination issued on March 29, 2001 by a delegate of the Director of Employment Standards ("the Director"). In that Determination, Top Win is ordered to pay compensation for length of service to Carol Chan, Ho Lung Chan, Ka-Lam Chan, Sing Yung Chau, Wan Yee Cheng, Dak Wah Fan, Yan Qun He, John Hwa Kin Hsu, Chi Keng Kwok, Don Yuen Po Lai, Norman Shun Lam, Dennis Leung Lee, Cheuk Kwan Tse, Amy Shui Yi Tsui, Yuet-Chun Yam, Pak Tim Yeung and Kam Hay Yuen ("the employees"), a total of $41,180.43, interest included.

Top Win has many complaints. They include a claim that the opportunity to respond to the complaints was insufficient. The Appellant argues that the Determination should be cancelled or, at least, varied because several of the employees indicate a desire to withdraw their complaints. It is also said 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 and, as such, section 63 does not apply.

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

## ISSUES TO BE DECIDED

The facts are said to be an issue.

It is argued, in effect, that a matter or matters should be referred back to the Director because

a) the delegate's investigation was insufficient and therefore unfair,

b) the delegate did not fully explain the *Act*,

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

d) the delegate did not assist with settling the complaints and failed to give Top Win 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 the investigation and the opportunity to respond is thought to be insufficient because the delegate did nothing to settle matters. According to Top Win, if a meeting had been set up, it would then have been able to convince

the employees that they should withdraw their complaints. And in the second of its two submissions it had this to say,

> "The Officer … agreed to allow time for Top Win to negotiate and handle the settlements. Then, there was no contact or further investigation from the Officer. However, Top Win 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 Win due to the insufficient response opportunity."

The employer argues that the Determination should be cancelled or, at least, varied because some of the employees now say that they want to withdraw their complaints.

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. In this regard, Top Win claims that it did not act to close its business, the landlord acted to close the business, and that was out of its hands. It 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 Top Win,

> "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" (Not an error. Top Win refers to itself as Top Gun in its submissions) "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."

Top Win 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 Win claims that it was locked out of its office.

Top Win asks that the amount of the Determination be reduced for reason of the following:

1. The many employment opportunities which Top Win 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; and/or
4. the fact that Top Win is a limited company with no assets.

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**

Top Win operated a restaurant in Greater Vancouver. Carol Chan, Ho Lung Chan, Ka-Lam Chan, Sing Yung Chau, Wan Yee Cheng, Dak Wah Fan, Yan Qun He, John Hwa Kin Hsu, Chi Keng Kwok, Don Yuen Po Lai, Norman Shun Lam, Dennis Leung Lee, Cheuk Kwan Tse, Amy Shui Yi Tsui, Yuet-Chun Yam, Pak Tim Yeung and Kam Hay Yuen ("the employees") all worked for Top Win.

The employees were terminated without notice on July 6, 2000. On that day, it was discovered that the landlord had changed the locks on the restaurant and, with that, the restaurant was closed.

Tregunter Holdings Ltd., acting for both Top Win and Top Gun Bowling Investments Ltd. ("Top Gun"), had been trying to renew the lease(s) held by or for the two companies since June of 1999. That is shown by a letter dated June 21, 1999 and subsequent letters. A letter dated July 10, 1999 complains of the failure of Fairchild Developments Ltd. to respond to Top Win's stated interest in renewing the lease. In a letter dated September 17, 1999, it is denied that Top Win is behind in its lease payments. A letter dated October 28, 1999 indicates that Top Win was seeking a reduction in minumum rent. Two letters dated June 30, 2000 show that there was a dispute over the amount of "additional rent" which Top Gun was to pay and that Top Gun was at that time paying only "minimum rent", signage and GST.

Top Win, on appeal, claims not to have agreed that it was liable to pay compensation for length of service. No evidence to the contrary, I am prepared to accept that Top Win does not admit that it is liable for length of service compensation.

Top Win claims that the delegate is incorrect in his belief that the landlord seized the assets of the restaurant. I find that whether it did or did not is of no relevance to the appeal.

A number of the employees write to say that they now want to withdraw their complaints. At least ten do so. There may be more as a number of other people indicate that it is their wish that

they be allowed to withdraw their complaints. Their names do not match names used in the Determination, however.

**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 of a lack of assistance in settling matters. And, for reason of the latter, the Appellant goes on to claim that the investigation is insufficient and the opportunity to respond 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.

It cannot be said that the delegate failed to investigate something of importance. He determined that the employees were terminated when the landlord had locks changed thereby denying the employer access to the restaurant. He determined that the employees were terminated without notice and he determined rates of pay and the length of each person's service. With that there was nothing left to investigate. This is a straightforward case.

There is not evidence to support a conclusion that Top Win was denied an opportunity to be heard. The evidence is clearly to the contrary. The delegate contacted Top Win in regard to the complaints, indeed, he went so far as to pay the employer a visit. And, should the employer have had more to say, it was of course then open to Top Win to contact the delegate.

The right to be heard does not include a right to help with settlements. The Appellant is also mistaken in its belief that the Director must grant an employer time to settle matters. 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)

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

The Appellant claims that it was promised time in which to settle complaints but not given that amount of time. I find that there is in fact no evidence to establish any broken promise.

According to the Appellant, the delegate failed to explain the *Act*. In this regard the employer specifically refers to a failure to respond to a letter dated April 2, 2001. In the letter, Top Win asks for an opinion on whether section 65(1)(d) overrides the obligation to pay length of service compensation. It appears that the delegate has never bothered to respond to the letter but, that

being said, I fail to see how this is in any way important to the Determination. The fact that Top Win might not understand the law or might not have been made aware of the law is hardly reason to cancel a Determination or even refer a matter back to the Director. Employers are expected to know the law and comply with it. And, as matters are presented to me, I cannot fault the delegate for his failure to address the section 65 issue in his Determination. It has no obvious application. And the evidence before me is that it is not until April 2, 2001 that the issued is raised. By then the Determination had been issued.

Several of the employees appear to have had second thoughts in respect to whether they should have filed complaints with the Employment Standards Branch in the first place. They now want to withdraw their complaints. It does not follow from that, however, that the Determination must then be varied. That is because the Director may issue a Determination on her own motion.

> **76** (3) Without receiving a complaint, the director may conduct an investigation to ensure compliance with this Act.
>
> **79** (1) On completing an investigation, the director may make a determination under this section.

What remains of this appeal can be dismissed on the basis that the Appellant is attempting to make a case on appeal that could have been made at the investigative stage but was not. In decisions like *Tri-West Tractor Ltd.* (BCEST No. D268/96) and *Kaiser Stables Ltd.* (BCEST No. D058/97), the Tribunal has said that as a matter of principle it will not allow a party to make a case on appeal which could have been made to the Director. 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."

I am satisfied that what remains of the appeal should be dismissed for reason of the above. But this appeal never had any hope of succeeding.

It is argued that the amount of the Determination should be reduced because Top Win has generated employment for people, it has been good to its employees in a number of 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 it is unfair and unreasonable to expect notice in this case because Top Win 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 Win was unable to renew its lease on terms acceptable to it, that the landlord moved to evict Top Win 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 Win) 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 a lessee has only four basic options: Satisfy the landlord, move, close the business or face being evicted. Top Win's eviction was predictable in that it chose to continue operating out of the landlord's building even though it had not resolved its dispute with the landlord.

The last of Top Win's complaints is that it is unfair to force an employer to pay length of service compensation where the employer is a victim of its landlord. This is not a matter for me to decide as the complaint is with the *Act* itself, not the Determination.

In summary, I am satisfied with the opportunity to respond and that the investigation was neither inadequate, improper or unfair. The fact that some employees now want to withdraw their complaints is not reason to vary the Determination. 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.

**ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination dated March 29, 2001 be confirmed in the amount of $41,180.43 and to that I add whatever further interest has accrued pursuant to section 88 of the *Act*.

---

**Lorne D. Collingwood**
**Adjudicator**
**Employment Standards Tribunal**