

An Application for Reconsideration

- by -

Spirit Ridge Resort Holdings Ltd.
("Spirit Ridge")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Robert Groves

FILE No.: 2012A/89

DATE OF DECISION: November 7, 2012

DECISION

SUBMISSIONS

Steve Schwartz	counsel for Spirit Ridge Resort Holdings Ltd.
Derek Stanbrook	on his own behalf
Kathleen Demic	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application brought by Spirit Ridge Resort Holdings Ltd. (“Spirit Ridge”) pursuant to section 116 of the *Employment Standards Act* (the “*Act*”).
2. Spirit Ridge requests a reconsideration of a decision of a Member of the Tribunal dated July 11, 2012, and numbered D070/12 (the “Original Decision”).
3. The Original Decision resulted from an appeal by Spirit Ridge of a determination (the “Determination”) issued by a delegate of the Director of Employment Standards (the “Delegate”) and dated March 27, 2012. The Determination ordered Spirit Ridge to pay \$51,149.48 in unpaid wages and interest, and \$1,000.00 in administrative penalties. The basis for the Determination was the Delegate’s finding that Spirit Ridge was a successor employer for the purposes of section 97 of the *Act*.
4. The Original Decision confirmed the Determination.
5. I have before me the Determination, the Reasons for the Determination, the record supplied to the Member by the Director pursuant to section 112(5) of the *Act*, the documents and submissions delivered by all the relevant parties in the appeal proceedings, the Original Decision, as well as documents and submissions of the parties on this application for reconsideration.
6. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. Having reviewed the materials before me, I find I can decide this application based on the written materials filed, without an oral or electronic hearing.

FACTS

7. Spirit Ridge owns and operates an “amenities” building that is a part of a resort development property located in Osoyoos. The resort property is owned by a company called Spirit Ridge Vineyard Resort Inc. (the “Resort”). The principal of Spirit Ridge is also a director of the Resort.
8. Spirit Ridge leased the restaurant in the building to 0755506 B.C. Ltd. (“Numberco”). Numberco ran a food services operation out of the restaurant space under the name and style of Passa Tempo. A significant customer of the restaurant was the Resort. Numberco routinely issued invoices to the Resort in respect of the catering and room service charges that were generated as a result of special events and the requests of guests.

9. During the summer of 2011, the Resort disputed some of Numberco's charges. It decided to withhold payment. This placed Numberco in serious financial difficulty. On August 18, 2011, Numberco's restaurant manager ("AL") informed the company's employees that they would not be paid their wages due the next day, but that they would be paid on August 23, 2011.
10. On August 19, 2011, the Resort confirmed that it would continue to withhold payment on the disputed charges. It became clear to AL, and the principal of Numberco ("PL"), that Numberco would not be in a position to make its payroll at all. They decided that they had no option but to surrender the restaurant operation to Spirit Ridge.
11. At 10:00 am on August 20, 2011, AL met with the CEO for the Resort ("RS"). In an interview conducted by the Delegate, AL said that she laid the keys to the restaurant on the table and told RS "the restaurant is yours now." The information the Delegate received from RS corroborated this account, in substance.
12. The record includes a document which appears to have been prepared on behalf of Spirit Ridge as a result of Numberco's abandonment of the Passa Tempo restaurant operation. The document is dated August 20, 2011. RS told the Delegate that AL signed the document, but the copy in the record only contains an illegible signature on behalf of Spirit Ridge. The document is addressed to Passa Tempo. It confirms that Passa Tempo had "abandoned" its lease of the restaurant premises, and by doing so it had reneged on its commitment to Resort guests. The document referred specifically to the fact that a wedding had been booked for the evening of August 20, and that "[i]n order to avoid damage to the reputation of the resort we will be stepping in to provide continuity of service." The document went on to state that "due to the urgency of the situation" Spirit Ridge was "compelled to use some of your inventory and equipment." An accounting was also promised.
13. The evidence accepted by the Delegate was that Numberco's employees in the restaurant continued to perform their regular duties as per usual throughout August 19-20, 2011. At no time during this period did the restaurant cease its normal operations. At no time did Numberco terminate the employment of any of the employees working in the restaurant when AL surrendered the operation of the business to RS.
14. At some point on August 20, 2011, the employees learned that Numberco had ceased to operate the restaurant, and that Spirit Ridge "had taken over." Spirit Ridge then asked the employees to sign employment agreements reading as follows:

We have just heard that Passa Tempo is ceasing operations. This leaves us all in a difficult position. We have been supporting Passa Tempo for some time by not insisting that it remain current in its obligations. Unfortunately it has not been able to make a go of its operations.

We have come to know you as a staff member of the employer and would like to extend an offer of employment to you. Your employer will be Spirit Ridge Resort Holdings Inc. We will honour your seniority with the Employer and will continue your employment. The law requires that you receive a record of employment from Passa Tempo. It will remain liable for any wages or other benefits of employment accrued to the time you last worked for it. The law provides certain priority to employees for wages due over other creditors.

We cannot say that we will permanently employ you. It is likely that we will look for another contractor to run the food beverage operation. In the meantime however we would like to carry on business as usual and honour commitments to those many people who have made plans to be married here or come from across the country to meet here. We have a wedding tonight as you know. Therefore we need to know immediately whether you are accepting this offer of employment.

15. Most of the employees continued to work under Spirit Ridge throughout the period of transition following Numberco's abandonment of the business. Questions then arose whether Spirit Ridge should be responsible for the wages of the employees unpaid by Numberco for the period from July 31, 2011, to August 19, 2011, and whether one employee who was dismissed by Spirit Ridge should receive compensation for length of service based in part on her service in the restaurant prior to August 20, 2011. The complaints which resulted in the issuance of the Determination, and the Member's Original Decision, were filed by employees seeking recovery of these unpaid wages from Spirit Ridge.
16. Following an investigation, the Delegate determined that Spirit Ridge was a successor employer for the purposes of section 97 of the *Act* and responsible for the unpaid wages that had accrued to the benefit of the complainants while they were employed by Numberco. Section 97 reads:
 97. If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.
17. The Delegate's conclusion turned on her interpretation of the word "disposed" in this provision. In particular, the Delegate relied upon the definition of the word "dispose" that appears in the *Interpretation Act* RSBC 1996 c.238 section 29. That definition says this:

"dispose" means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things.
18. The Delegate rejected the argument of Spirit Ridge to the effect that since Numberco had "abandoned" the restaurant business, there was no "disposition" for the purposes of section 97. The Delegate was of the opinion that AL's handing the keys to the premises to RS, and her stating that "the restaurant is now yours," was sufficient to "give" the operation to Spirit Ridge. As an act of giving is one of the ways one might dispose of something under section 29 of the *Interpretation Act*, the Delegate decided that there had been a disposition under section 97 of the *Act*.
19. The Delegate also declined to accept Spirit Ridge's assertion that since it did not decide to continue to operate Passa Tempo until noon on August 20, 2011, some two hours after AL handed over the keys, the employment of the restaurant's employees was interrupted, thereby vitiating the effect of section 97. The Delegate noted that the employment of the employees was never terminated by Numberco, they continued to work throughout August 20, 2011, the restaurant did not shut down at any time during the day, Spirit Ridge commenced to run the restaurant at noon, and paid the employees for all the hours worked by them on that day, including hours worked before noon. For these reasons the Delegate concluded that any hiatus between the act of giving on the part of Numberco, and the decision to continue operations on the part of Spirit Ridge, was insufficient to nullify a finding that the employees' employment was deemed to be continuous and uninterrupted as a result of a disposition, pursuant to section 97.
20. On appeal, Spirit Ridge contended that the Delegate had erred in law in her interpretation of section 97. It argued that Numberco's actions on August 20, 2011, constituted an abandonment of the Passa Tempo business, not a transfer. The delivery of the keys was not an act of "giving," but merely a return to the landlord on the cessation of business operations. Since Spirit Ridge did not decide to operate the restaurant until two hours had elapsed from the time of the surrender, its hiring of Numberco's employees should not engage section 97.
21. The Original Decision confirmed the Delegate's Determination. The Member noted that Spirit Ridge had not merely enforced its rights under its lease with Numberco. Instead, it had decided to continue to operate

the restaurant business. From the point of view of the restaurant employees, their employment had continued without interruption.

22. The Member also made reference to the fact that Spirit Ridge agreed to “continue” the employment of the employees and “honour” their seniority. In its confirmation document addressed to Passa Tempo, Spirit Ridge stated that it would be “stepping in to provide continuity of service.” It also stated it would be taking possession of some of the restaurant inventory and equipment.
23. The Member then said the following by way of explanation of the rationale for his decision:

...I consider this situation to amount to a surrender of assets by Passa Tempo to Spirit Ridge coupled with the latter’s acceptance of this surrender. To put the matter a different way, there was a “transfer” of the business assets (at least with respect to inventory) and thus a “disposition” within section 97 of the *Act*. Whereas Passa Tempo had formerly operated the business, it was now being operated by Spirit Ridge. The Tribunal has previously held that “section 97 is broad enough to include any disposition that results in a change in the legal identity of the employer” (*Lari Mitchell et al.* BC EST # D107/98 at p.11) and in this case the employees seamlessly transitioned from Passa Tempo’s employ to being employed by Spirit Ridge.

Even if one were to accept Spirit Ridge’s assertion that there was a 2-hour gap between the surrender of Passa Tempo’s assets and Spirit Ridge’s decision to assume control of the restaurant’s operations (including taking possession of the restaurant’s assets), there is simply no evidence that the Passa Tempo employees were ever terminated before Spirit Ridge assumed control of the restaurant’s operations. Accordingly, and accepting Spirit Ridge’s position that it did not assume control of the business assets until 12 noon on August 20, 2011, *at that point in time*, the Passa Tempo employees were still in the latter firm’s employ. Clearly, there was a change, sometime around noon, in the legal identity of the employer because Spirit Ridge made formal offers of continuing employment to all Passa Tempo employees. Passa Tempo divested itself or otherwise released the restaurant assets to the custody and control of Spirit Ridge and when that disposition occurred, all of Passa Tempo’s employees then fell within the protection of section 97.

The present case is not akin to section 97 decisions, such as *Valorosos* (BC EST # RD046/01) and *550635 BC Ltd.* (BC EST # D272/99), where the employees were terminated prior to the disposition. Spirit Ridge could have held off assuming control of the restaurant until such time as the employees were clearly terminated from their former employment with Passa Tempo; however, presumably for its own pragmatic business reasons, Spirit Ridge decided to simply assume control of the restaurant without insisting that the employees had first been formally terminated from their prior employment.

...

Although it may be accurate to state, as Spirit Ridge’s counsel does, that “the employees did not belong to [Spirit Ridge] at the time of the abandonment,” it does not follow, as is also asserted by counsel, that “Spirit Ridge cannot be held liable for Passa Tempo’s failure to properly terminate its employees.” The purpose of section 97 is to override the common law and deem existing employees of the predecessor firm to be employees of the successor firm as and from the employees’ original date of hire with the predecessor (see *Lari Mitchell et al., supra*). It is precisely for this reason that a potential successor must ensure, if it does not wish to be caught within section 97, that the employees of the predecessor firm are terminated *prior* to the disposition of the assets.

In my view, on or about August 20, 2011, there was a disposition of the restaurant’s assets (including the trade fixtures, inventory and existing catering and other contracts) from Passa Tempo to Spirit Ridge. As of the date of this disposition, none of the employees named in the Determination had been terminated and thus were still formally employed by Passa Tempo. As such their employment was deemed to be continuous and uninterrupted by the disposition....

ISSUES

24. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:
1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be confirmed, cancelled, varied or referred back to the original panel, or another panel of the Tribunal?

ANALYSIS

25. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:
- 116 (1) On application under subsection (2) or on its own motion, the tribunal may
- (a) reconsider any order or decision of the tribunal, and
 - (b) confirm, cancel or vary the order or decision or refer the matter back to the original panel or another panel.
26. It is important to remember that the reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.
27. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *Act*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is also derived from a desire to preserve the integrity of the appeal process described in section 112 of the *Act*. A party should not easily have available to it an avenue for avoiding the consequences of a Tribunal decision with which it is unhappy. Nor should it be entitled to an opportunity to re-argue a case that failed to persuade the Tribunal at first instance. Having regard to these principles the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's appeal decision overturned.
28. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the applicant's submissions, the record that was before the Member in the appeal proceedings, and the decision the applicant seeks to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the decision which are so important that they demand intervention.
29. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.
30. In my opinion, Spirit Ridge has failed to demonstrate that the Member's conclusion in the Original Decision warrants reconsideration.
31. Spirit Ridge challenges the Original Decision on two grounds. It asserts first that the Decision contains mistakes of fact. Second, it alleges that the Member made a serious mistake in applying the law.

32. One of the mistakes of fact to which Spirit Ridge alludes is the finding in the Delegate's Reasons, referred to by the Member in the Original Decision, that Spirit Ridge paid the restaurant employees all their wages for work performed on August 20, 2011, including wages earned before noon, when Spirit Ridge says it commenced to operate the Passa Tempo business. Spirit Ridge says that it only paid for work done after noon on that day, and this supports its assertion that there was an interruption in the operations of the restaurant before it assumed control.
33. The second mistake of fact that is alleged is the Member's assertion that Spirit Ridge took possession of the business assets of Numberco when the former departed the premises. Spirit Ridge submits that "some or most" of the business assets belonged to it as landlord, and could not have been removed from the property. In addition, a bailiff acting for a secured party seized "some of the assets" and liquidated them.
34. Neither of these alleged mistakes of fact is sufficient to persuade me that the Original Decision is flawed in a way that demands my intervention pursuant to section 116.
35. In her Reasons, the Delegate made a finding of fact that Spirit Ridge paid the employees their full wages earned on August 20, 2011, including wages earned prior to 12:00 pm. That finding was based on interviews the Delegate conducted with the complainants. Given the highly restricted jurisdiction available to the Tribunal to re-visit findings of fact made by delegates of the Director as a result of their investigations, it is not surprising that the Member would have accepted it as a fact for the purposes of the appeal. This is especially so given that it does not appear that Spirit Ridge challenged the finding in any of its submissions delivered to the Tribunal during the appeal proceedings.
36. But even if it could be said that the Delegate's finding was in error, and Spirit Ridge only paid the restaurant employees for work performed after noon on August 20, 2011, it is my opinion that the result would remain the same. The focus of the Original Decision was section 97 of the *Act*. The Member decided that once Numberco surrendered the restaurant operation to Spirit Ridge, and Spirit Ridge decided, later in the day, to commence to operate the restaurant as a going concern, at least temporarily, a disposition engaging section 97 occurred, and the employment of the employees was deemed to be continuous and uninterrupted for the purposes of their securing the statutory benefits to which they were entitled under the *Act*. The Member's conclusion did not rest exclusively, or even primarily, on a finding that Spirit Ridge paid the restaurant employees for work performed by them while they were still, technically, employees of Numberco.
37. As for the alleged mistake relating to the taking of possession of business assets of Numberco, I note that the submission of Spirit Ridge states that "some" or "most" of the business assets belonged to Spirit Ridge, and "some" of the others were seized by a bailiff. The use of these words can only lead to the inference that "some" of the assets left behind actually belonged to Numberco. Nowhere does Spirit Ridge state unequivocally that none of the assets left behind belonged to Numberco. I also note that in the confirmation document dated August 20, 2011, Spirit Ridge stated that since Passa Tempo was abandoning the premises at a time when a wedding had been scheduled Spirit Ridge felt compelled to make use of some of the restaurant "inventory and equipment," due to "the urgency of the situation." On balance, I am not persuaded that the Member erred when he stated that Spirit Ridge took possession of assets formerly held by Passa Tempo in order to provide "continuity of service."
38. Again, even if I am wrong in my assessment, it must be noted that the application of section 97 is not limited to situations where "assets" are disposed of. The section refers, in addition, to the disposition of all or part of a "business" as something separate and distinct from its "assets." This wording means that the section may be engaged when no assets are disposed of, but all or part of the "business" is. Thus, even if it could be said that Spirit Ridge did not take title to any assets of Numberco following the abandonment of the lease, its

taking possession of them, even temporarily, in order to continue the operation of the restaurant, is sufficient to trigger the effect of section 97 (see *Sladey Timber*, BC EST # D360/02).

39. Spirit Ridge also submits that the Member committed a serious error of law. It repeats its position voiced throughout the history of these proceedings that no disposition for the purposes of section 97 occurred in this case. It argues that if the Member's interpretation of section 97 is confirmed, it will mean that any entity which subsequently exerts some level of control over a business that has been abandoned, in circumstances where the employment of the employees of the business has not been terminated before the new operator steps in, the new operator will find itself obligated to satisfy statutory entitlements that accrued to the employees prior to the abandonment. Spirit Ridge submits that such an interpretation is unjust and should be rejected.
40. I disagree. In *Lari Mitchell*, BC EST # D107/98, a leading decision of the Tribunal regarding the interpretation of section 97, the reconsideration panel said that the language in the section casts a wide net. Indeed, it is broad enough to include any disposition that results in a change in the legal identity of the employer of the employees who are seeking its protection. This may include situations where the disposition contemplated in the section involves a purchase, the termination of a lease, the cessation of business operations, a bankruptcy, the appointment of a receiver, or a seizure under a secured instrument (see *Dr. Robert S. Wright Inc.*, BC EST # D060/96, *Canaway Holdings Ltd.*, BC EST # D161/01, *Western Everfresh Bakeries Ltd.*, BC EST # D364/02, *Hartloff*, BC EST # D147/04, *Macdonald*, BC EST # D193/05, *0699027 BC Ltd. carrying on business as Speedy Brake Centres*, BC EST # D111/11).
41. Part of the reason why section 97 is to be interpreted broadly is that the *Act* is remedial legislation that should, in accord with section 8 of the *Interpretation Act*, be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" (see *Helping Hands Agency Ltd. v. Director of Employment Standards* (1995) 15 BCLR (3d) 27 (BCCA)).
42. Interpretive guidance is also to be derived from the comments of the Supreme Court of Canada in *Machtiger v. HOJ Industries Ltd.* (1992) 91 DLR (4th) 491, where Mr. Justice Iacobucci, writing for the majority of the court, said this in the context of a case engaging the Ontario version of our *Act*:
- The objective of the Act is to protect the interests of employees by requiring employers to comply with certain minimum standards...
43. *Machtiger* is also authority for the proposition that an interpretation of the *Act* which encourages employers to comply with the minimum requirements contained within it, and so extends its protection to as many employees as possible, is favoured over one that does not.
44. Given this interpretive framework, I am driven to conclude that in the circumstances presented in this case the Member was entirely correct to decide that a section 97 disposition had occurred, and that the employment of the employees at Passa Tempo must be deemed to have been continuous and uninterrupted once Spirit Ridge decided to operate the restaurant business, however temporarily, on August 20, 2011.
45. There are several factors which have contributed to my reaching this conclusion. First, Numberco did not terminate the employment of the Passa Tempo employees at any time prior to Spirit Ridge's taking over the restaurant operation. Whatever the impact at common law on the employment of the restaurant employees consequent upon Numberco's abandonment of the restaurant at 10:00 am on August 20, 2011, section 97 mandates that their employment is deemed to have been continuous and uninterrupted if all or part of the restaurant business, or a substantial part of the entire assets of the business, were disposed of by Numberco.

46. I agree with the conclusions of both the Delegate and the Member that the language in section 97 is inclusive enough to incorporate the giving over of the restaurant business which clearly appears to have occurred in this case, as evidenced by AL's delivering the keys to the restaurant premises to RS, and stating that "the restaurant is now yours." This, combined with the fact that Spirit Ridge did ultimately decide to accept the surrender and to commence to operate the restaurant as a going concern, making use of at least some items of inventory and equipment located in the restaurant, but more significantly the labour capital of the business in the form of the experienced and knowledgeable employees who had continued to work in the restaurant throughout the transition, persuades me that a "disposition" for the purposes of section 97 was what transpired on August 20, 2011.
47. In my view, the two-hour hiatus referred to by Spirit Ridge is a red herring, precisely because the employment of none of the employees working there had been terminated, the restaurant continued to operate as usual during this period, and Spirit Ridge did decide to commence to operate it with those employees, as a going concern, once the two-hour period had ended. While it may be that the restaurant employees continued to be the responsibility of Numberco until the two-hour period had ended (a question on which I offer no opinion), I am of the view that once Spirit Ridge "took over" the management of the restaurant operation at noon on August 20, 2011, a disposition for the purposes of section 97 had occurred, and the employment of the restaurant employees was deemed to be continuous and uninterrupted, whether Spirit Ridge intended this legal result or not.
48. I do not propose to speculate on, as the submission of Spirit Ridge does, whether section 97 should be applied in other scenarios not exactly akin, factually, to the circumstances presented in this case. It is trite to state that different considerations, and different legal conclusions, may be appropriate if and when different factual circumstances are presented to the Tribunal. It is sufficient for our purposes that my decision on this application is based on the facts of this case, and the language of section 97.

ORDER

49. Pursuant to section 116(1)(b) of the *Act*, I order that the Original Decision be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal