



# Civil Resolution Tribunal

Date Issued: April 17, 2018

File: SC-2017-003318

Type: Small Claims

## Civil Resolution Tribunal

Indexed as: *Pereira v. Hirsch Creek Golf and Winter Club et al*, 2018 BCCRT 136

### BETWEEN:

Corinne Pereira

**APPLICANT**

### AND:

Hirsch Creek Golf and Winter Club and Winston Michell

**RESPONDENTS**

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## REASONS FOR DECISION

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Tribunal Member:

Jordanna Cytrynbaum

## INTRODUCTION

1. The applicant Corinne Pereira worked for the respondent Hirsch Creek Golf and Winter Club (Hirsch Creek) from 2015 to 2017. During that time she designed menus for Hirsch Creek's restaurant. The respondent Winston Michell was Hirsch Creek's general manager.

2. This dispute is about whether Ms. Pereira owns any copyright to the menu designs. The applicant claims she owns the copyright and that the respondents are liable for infringing that copyright. The respondents deny that they committed any wrongdoing.
3. All parties were self-represented.

## **JURISDICTION AND PROCEDURE**

4. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 3.1 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
5. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions because I find that there are no significant issues of credibility or other reasons that might require an oral hearing. The parties did not request an oral hearing.
6. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
7. Under tribunal rule 126, in resolving this dispute the tribunal may make one or more of the following orders:
  - a. order a party to do or stop doing something;
  - b. order a party to pay money; or

- c. order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

8. The issue in this dispute is whether the applicant, or her former employer Hirsch Creek, owns the copyright to the menus. This turns on whether the applicant designed the menus in the course of her employment.

## **EVIDENCE AND ANALYSIS**

### **Introduction**

9. In a civil dispute such as this, the applicant bears the burden of proof on a balance of probabilities.
10. The parties filed lengthy submissions containing both their arguments and evidence. I will not refer to all of the evidence or deal with each point raised. I will refer only to the evidence and submissions that are relevant to my determination, or to the extent necessary to give context to these reasons.

### **Evidence**

11. As noted above, the applicant began working for Hirsch Creek in July 2015. Her title and responsibilities evolved over time.
12. The applicant was initially hired as head line cook. In this role, her responsibilities included assisting the kitchen manager with creating menus and recipes, and undertaking special projects assigned by the kitchen manager.
13. The applicant was subsequently promoted to assistant kitchen manager in or about March 2016. In that role, I find the applicant took on additional duties, including marketing responsibilities to promote the restaurant and increase sales.
14. In August 2016 the applicant was promoted to assistant general manager. In this role, she was responsible for managing all aspects of Hirsch Creek's operations in

the absence of the general manager. The applicant's duties as assistant general manager included in particular the following;

- (a) collaborating with the general manager on external and internal marketing and sales promotion activities;
  - (b) assisting with creating the menus as well as layout and pricing for the menus;  
and
  - (c) developing and implementing an on-going marketing program to increase food and beverage sales.
15. I find that in the course of carrying out her responsibilities, the applicant redesigned the restaurant menus. This involved changing the layout and font, and by adding graphics and photographs of the food (among other things).
  16. There was no evidence presented that the applicant was a freelance photographer or designer.
  17. In or about late July 2016, the applicant began working on redesigning the menus. I find that she did so with the approval of the general manager at the time, after proposing the project to Hirsch Creek. It is not disputed that Hirsch Creek paid for the cost of printing. The applicant also performed some design work on Hirsch Creek's website. The applicant performed these tasks for Hirsch Creek's use and benefit. The applicant claims she performed these tasks (or some of them) at home and outside of her normal working hours.
  18. Hirsch Creek provided the applicant with a performance review in February 2017 at which time it increased her salary.
  19. Mr. Michell assumed the role of General Manager in May 2017. I find that the applicant took issue with his management style and resented the fact that Mr. Michell brought about certain changes.

20. When the applicant resigned her employment, she claimed that she owned the copyright to the menus. Specifically, the applicant claimed that because she had taken the photographs and designed the menus, that these were her artistic works. She further claimed that this work was not performed in the course of her employment. The applicant demanded that Hirsch Creek cease using the menus and compensate her for alleged infringement of her copyright.

## **Analysis**

21. Section 13(1) of the *Copyright Act* sets out that the author or creator of a work is the first owner of the copyright. However, section 13(3) of the *Copyright Act* states that when works are made in the course of employment, the employer is the first owner of the copyright – unless there is an agreement to the contrary. This principle is also generally applicable to officers, directors and key employees who create a work for the benefit of a corporate entity: *Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, [2011] F.C.J. No. 451.
22. Determining whether a work was made in the course of employment requires a contextual analysis.
23. The phrase “in the course of employment” has been afforded a broad interpretation by the courts that goes well beyond work performed “during” employment. “In the course of employment” includes work done by an employee while the employee is generally going about their duties, even if not entirely off-duty. Whether the work in question was created during the employee’s personal time or at home is therefore not determinative: *Mejia v. LaSalle College International Vancouver Inc.*, 2014 BCSC 1559, citing *Grayson v. Wellington Insurance Co. (1997)*, 1997 CanLII 4112 (BCCA), 37 B.C.L.R. (3d) 49. See also *Seanix Technology Inc. v. Ircha*, [1998] 10 W.W.R. 688 (BCSC).

## Determination

24. With respect to the claim against Hirsch Creek, on the evidence I find that the applicant's work designing the menus fell within the scope of her duties. Further, I find she did this work for the use and benefit of her employer. I therefore find that the applicant designed and created the menus in the course of her employment. As such, Hirsch Creek is presumed to be the first owner of the copyright to the menus. There was no evidence of any agreement to rebut this presumption.
25. Turning now to the claim against Mr. Michell, there was no evidence to suggest that he acted in his personal capacity. Further, the evidence does not establish that he did anything improper. I find that there is no basis for the claim against him personally.
26. For these reasons, I find the applicant has failed to establish on a balance of probabilities that there was any breach of the *Copyright Act*. Having failed to establish any breach, it is unnecessary to consider the applicant's claim for remedies, including her claim for punitive damages. Given the applicant was not successful, I find she is not entitled to reimbursement of tribunal fees or expenses.

## ORDERS

27. I order that the applicant's dispute is dismissed.

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Jordanna Cytrynbaum, Tribunal Member