

An appeal

- by -

Patara Holdings Ltd. carrying on business as  
Best Western Canadian Lodge and/or Canadian Lodge  
("Patara")

- 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* (as amended)

**TRIBUNAL MEMBER:** Shafik Bhalloo

**FILE No.:** 2007A/156

**DATE OF DECISION:** January 29, 2008

## DECISION

### OVERVIEW AND FACTS

1. This is an appeal by Patara Holdings Ltd. carrying on business as Best Western Canadian Lodge and/or Canadian Lodge (“Patara”) under Section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards (the “Director”) issued October 12, 2007 (the “Determination”).
2. In the Determination, the Delegate found that that Patara breached the *Employment Standards Act* and owed wages to two employees, namely, Ken Blackmore (“Mr. Blackmore”) and Jennifer Blackmore (“Mrs. Blackmore”) (jointly the “Blackmores”). The Determination followed an investigation by the Delegate and not a hearing of the issues.
3. By way of background, the Blackmores were hired as resident managers of a 69-room motel operated by Patara in Valemont, British Columbia from July 6, 2005 to August 31, 2006. The Blackmores filed complaints under Section 74 of the Act alleging that Patara contravened the Act by failing to pay them wages and vacation pay (the “Complaints”). The specific issues before the Delegate of the Director were whether the Blackmores were paid for all of the hours they claimed they worked, and whether they were managers as defined by the Act and if not, whether they were entitled to premium rates for working overtime and statutory holidays.
4. The Delegate sent a letter dated July 11, 2007 to Patara advising the latter of the Complaints and requesting a response by July 27, 2007.
5. On July 27, 2007, Patara’s representative, Darcy Patara (“Mr. Patara”), telephoned the Delegate on behalf of Patara and requested an extension of time to provide the information requested in the Delegate’s July 11, 2007 letter. The Delegate acceded to that request and extended the time for Patara’s response to August 3, 2007 and confirmed the extension in a letter dated July 27, 2007, which was faxed to the attention of Mr. Patara at Patara’s office. On August 3, 2007, the Delegate received from Patara some copies of the Blackmores’ pay stubs but no other records were provided.
6. On August 7, 2007, the Delegate spoke with Mr. Patara and advised the latter that the records provided by Patara were incomplete and reviewed the requirements of the Act governing production of employer records with Mr. Patara and followed-up, on the same date, with a formal Demand for Employer Records (the “Demand”) by fax to Patara office requiring Patara to produce all records with respect to the employment of the Blackmores by August 17, 2007. However, no further records were forthcoming from Patara.
7. On September 17, 2007, the Delegate faxed to Patara statements of the Blackmores in support of their Complaints delineating the hours they worked and the job duties they performed for Patara. The Delegate requested Patara to review the same and provide a response by September 27, 2007 after which the Delegate would issue his Determination. However, Patara did not respond to the Delegate’s fax or comply with the deadline set by the Delegate for a response.

8. The Delegate, with the benefit of the statements of the Blackmores and some pay statements of the latter produced by Patara, issued his preliminary findings in a letter dated September 28, 2007 which the Delegate faxed to Patara's business fax number on the same date. In his preliminary findings, the Delegate concludes that the Blackmores were not managers as defined in the Act and the Employment Standards Regulations (the "Regulations") and seeks to review the Complaints with a view to determining the entitlement of the Blackmores to minimum wages, overtime wages and statutory holiday pay. The Delegate also gives notice to Patara in the preliminary findings that based on the evidence in his investigation he was inclined to find that Patara committed at least four contraventions of the Act or Regulations that would result in four administrative penalties against Patara. The Delegate also requested Patara to review the information in the preliminary findings and provide its response by October 3, 2007, failing which the Delegate would issue his formal determination. Patara, however, did not respond to the preliminary findings of the Delegate and on October 12, 2007, the Director made his determination mainly relying upon the submissions of the Complainants.
9. In the Determination, the Delegate found that the Blackmores were not managers and that Patara breached the Act by failing to pay each of them (1) minimum wages under Section 16 of the Act, (2) overtime pay under Section 40 of the Act, (3) statutory holiday pay under Section 46 of the Act, and (4) annual vacation pay under Section 58 of the Act relating to the amounts payable on the above claims.
10. The Director also ordered Patara to pay accrued interest under Section 88 of the Act on the amounts found owing to the Blackmores. The Director also imposed on Patara four administrative penalties in the amount of \$500.00 each for the contraventions of Sections 16, 40, 46 and 58 of the Act. The total amount Patara was ordered to pay under the Determination to the Director is \$12,937.74.
11. The Determination expressly delineated the deadline for appealing the Determination as November 19, 2007 and directed the parties, if they wished to appeal the Determination, to deliver their appeal to the Employment Standards Tribunal (the "Tribunal") by 4:30 p.m. on the said date. The Determination also expressly advised the parties that they could access the information on the Tribunal and how to appeal the Determination at the Tribunal's website at [www.bcest.bc.ca](http://www.bcest.bc.ca) or by contacting the Tribunal at 604-775-3512. The Determination also expressly distinguished the Tribunal from the Employment Standards Branch (the "Branch") stating "the Tribunal is separate and independent from the Employment Standards Branch". Notwithstanding, Patara, on the last day for filing the appeal (i.e. November 19, 2007), faxed its Appeal Form and written submissions to the Branch and not to the Tribunal. The Director, subsequently, forwarded a copy of Patara's faxed appeal to the Delegate who wrote the Determination and thereafter, on or about December 5, 2007, the Delegate or the Branch forwarded Patara's appeal to the Tribunal. The Tribunal, on the same date, contacted Patara and advised the latter that it had filed the Appeal with the wrong body. Patara then, on December 10, 2007, submitted its appeal to the Tribunal.
12. Patara is appealing the Determination on the grounds that the Director failed to observe the principles of natural justice in making the Determination and that evidence has become available that was not available at the time the Determination was being made. Patara has not indicated in its appeal what it wants the Tribunal to do about the Determination.
13. As Patara has filed its appeal after the expiry of the appeal period in Section 112 of the Act, there is a preliminary issue that needs to be dealt with, namely, whether the Tribunal should exercise its discretion under Section 109 (1)(b) of the Act to extend the time period for Patara's appeal. The Tribunal is of the view that an oral hearing is not necessary in order to adjudicate the preliminary issue and therefore, the

Tribunal will determine the preliminary issue based on the parties' written submissions as well as the Section 112 (5) "Record".

14. If Patara is successful in obtaining an extension of time to file its appeal then the Tribunal will consider the substantive issues raised by Patara in the Appeal.

## **ISSUES**

15. The issues to be determined in this Appeal are:

Should Patara be afforded an extension of time for requesting an Appeal even though the Appeal period has expired?

If the answer to the first question is in the affirmative, then:

- (i) did the Director fail to observe the principles of natural justice in making the Determination?
- (ii) has evidence become available that was not available at the time the Determination was being made?

## **SUBMISSIONS AND ANALYSIS ON THE PRELIMINARY ISSUE OF EXTENSION OF TIME TO FILE THE APPEAL**

16. Section 112 of the Act delineates the code for any party wishing to appeal the Director's Determination including the appeal period or the time limit for filing an Appeal. Subsection 112 (3)(a) and (b) provide:

112 (3) the appeal period referred to in subsection (2) is:

- (a) thirty (30) days after the date of service of the determination, if the person was served by registered mail, and
- (b) twenty-one (21) days after the date of service of the determination, if the person was personally served under Section 122 (3).

17. Section 109 (1)(b) of the Act sets out the Tribunal's authority to extend the time period for requesting an appeal under Section 112, and provides:

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

...

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

18. The Tribunal will exercise its statutory discretion to extend the time for filing an appeal only where there are compelling reasons, and the burden is on the appellant to show that such reasons exist. As indicated by the Tribunal in *Re: Tang*, BC EST #D211/96:

Section 109 (1)(b) of the Act provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

19. In *Re: Dennill (c.o.b. Fibremaster Restorations & Carpet)*, BC EST #D080/01, the Tribunal delineated the following criteria that appellants will be adjudged on in their applications for an extension of time to file an appeal:

1. There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
2. There was a genuine and ongoing *bona fide* intention to appeal the Determination;
3. The respondent party as well as the Director was aware of this intention;
4. The respondent party will not be unduly prejudiced by the granting of the extension;
5. There is a strong *prima facie* case in favour of the appellant.

20. In my view, the criteria delineated in *Re: Denill*, while very comprehensive, are not conjunctive in nature. That is, the Tribunal need not find that all the criteria in *Re Denill* favour the applicant seeking an extension before the Tribunal will grant an extension of time to appeal. There may be some criteria that the appellant has stronger and more favourable evidence on than others and the Tribunal will have to weigh that evidence with evidence on other criteria that may be less favourable or even unfavourable to the appellant. The Tribunal simply needs to weigh the evidence adduced on all the criteria and do a balancing act in making a final determination on the issue. For example, if the respondent party as well as the Director were not aware of the Appellants intention to appeal but the appellant produces convincing and favourable evidence on the balance of the criteria in *Re Denill*, the Tribunal may be hard pressed not to grant an extension of time.

**(a) Patara's Submissions**

21. Patara made very brief submissions on the preliminary issue and therefore, I will set them out in full below. Mr. Patara states in his submission on behalf of Patara:

I had originally sent these document (sic) on the 19 of November after talking to the local office here in Kamloops. I now found out they had to go to Vancouver and have sent them off (on) Dec. 10/2007. That is the reason for the mix-up.

**(b) The Blackmores' submissions**

22. The Blackmores, in their submissions on the preliminary issue, state that they were not aware that Patara intended to appeal the Determination during appeal period and that there is nothing new arising in Patara's submissions.

(c) *The Director's Submissions*

23. The Director relies on the criteria in *Re: Dennill, supra*, in making submissions on the preliminary issue. In particular, the Director submits that there is no good reason why Patara could not have met the deadline for the appeal, particularly since the directions governing the filing of the appeal are clearly set out in the Determination. The Director also submits that the delay of almost four weeks in filing the appeal is unreasonable and that while Patara faxed a copy of the appeal to the Director (within the timeline for appealing) which the Director then forwarded to the Delegate who made the Determination, there is no explanation of why Patara did not also fax a copy of its appeal to the Tribunal. The Director also submits that Patara's grounds for appeal do not indicate a strong case that might succeed if an extension of time were granted. However, the Director admits that there would be no harm to the respondent's case if Patara were granted an extension of time to file its appeal.
24. Having reviewed the submissions of the parties, based on the criteria set out in *Re: Dennill*, I am not satisfied that an extension of time to appeal ought to be granted to Patara. My reasons follow.
25. First, with respect to the reason for Patara's late filing of the appeal, it is clear to me, based on Patara's submissions, that Patara was either careless and/or failed to read the clear instructions governing appeals in the Determination and the Appeal Form. While this factor alone is not determinative of the preliminary issue, it is important to note that Patara's failure to follow the instructions on appeal may, to a limited extent, be mitigated by the fact that Patara submitted its appeal, albeit to the wrong body, within the time limit for filing the appeal. This same factor, with respect to the second criterion in *Re Denill*, may be viewed as a genuine and ongoing *bona fide* intention of Patara, during the appeal period, to appeal the Determination.
26. With respect to the third criterion in *Re Denill*, while the Blackmores were not aware of the appeal until after the expiry of the appeal period, the Director certainly was aware of Patara's appeal within the time allowed for appealing as the Director received Patara's appeal on November 19, 2007. The Director also notes that he then forwarded the appeal to the Delegate who was responsible for the Determination who in turn presumably sent the appeal to the Tribunal on December 5, 2007. The Tribunal then contacted Patara on the same date and advised Patara that its appeal had not been properly filed. It was thereafter that Patara, on December 10, 2007, filed its appeal with the Tribunal. Patara did not offer any explanation why there was a further delay of five days to file its appeal and while this may serve as a negative consideration in my weighing of the evidence on the preliminary issue, it is not a determinative factor on its own in my decision on the issue.
27. I also note that a factor in favour of Patara on the preliminary issue is the Director's submission that there would not be any harm to the respondent's case, if the appeal deadline were extended for Patara. However, while the evidence adduced by the parties in this case on the first four criteria in *Re: Dennill* is not determinative for me on the issue of whether or not Patara should be granted an extension, the final criterion, namely, whether or not Patara has a strong *prima facie* case is. With respect to the latter criteria, I reviewed the very brief submission of Patara on appeal, which I am producing in full below:

"We have evidence that shows Mr. Blackmore was involved in another job at the same time he was working at the motel. We also have witnesses that can prove he was not working the hours he stated. We also have (cheques) that were signed by Mr. Blackmore from the restaurant that he was running showing that he was not only doing two jobs, but also employees who will testify that he was working another job (sic)."

28. I am not persuaded, on the basis of Patara’s submissions that there is a strong prima facie case in Patara’s favour. First, with respect to the natural justice ground of appeal, Patara has not made any submissions whatsoever in support of that ground of appeal. Conversely, there is ample evidence under Section 112 (5) “Record” showing that the Delegate notified Patara of the Complaints and provided Patara with an extension of time to respond to the Complaints, and thereafter, two further opportunities to respond to the Complaints, including one after the Delegate made his preliminary findings, but Patara failed to respond to those opportunities and did not make any submissions.
29. With respect to the new evidence ground of appeal, I also find that Patara does not have a strong prima facie case in its favour. In particular, in Patara’s submissions, there are three parts to the new evidence that Patara wishes to adduce in its appeal. First, Patara claims that it now has evidence that shows that Mr. Blackmore was involved in another job at the same time as he was working at Patara’s motel. Second, Patara states that it has cheques “signed by Mr. Blackmore from the restaurant he was running” at the same time that he was working at Patara’s motel to substantiate that Mr. Blackmore had two jobs at the same time. Finally, Patara submits that it also has witnesses that can prove that Mr. Blackmore was not working the hours he claims in the Complaints.
30. What is curious is that Patara is suggesting that it has the above “new evidence” but neither produces the alleged evidence in the appeal nor explains why it did not produce it during the investigation of the Complaints by the Delegate when it was offered numerous opportunities to make submissions. Further, the nature of the “new evidence” Patara says it now has appears to be evidence that Patara could have produced during the investigation of the complaint and frankly, even if Patara had actually produced such evidence in its appeal, it would fail to meet the test for admitting new evidence delineated in *Re: Merilus Technologies Inc.* [2003] BC ESTD No. 171(QL) and *Re: Bloomberg Biotechnology Development Ltd.* [2007] BC ESTD No. 37 (QL) because it is the type of evidence that could have been produced during the investigation of the Complaints.
31. Accordingly, Patara is denied an extension of time to file its appeal.

## **ORDER**

32. Pursuant to Section 114 of the Act, Patara’s appeal is dismissed on the basis that a request for an appeal has not been made within the time permitted.
33. Pursuant to Section 115 of the Act, I order that the Determination be confirmed as issued in the amount of \$12,937.74 together with whatever additional interest may have accrued pursuant to Section 88 of the Act since the date of issuance.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**