

An appeal

- by -

Huggies Buggies Day Care Inc.
(“Huggies”)

- 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.: 2013A/93

DATE OF DECISION: March 5, 2014

DECISION

SUBMISSIONS

Mansoorah Chaudhry

on behalf of Huggies Buggies Day Care Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Huggies Buggies Day Care Inc. (“Huggies”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 25, 2013 (the “Corporate Determination”).
2. The Corporate Determination found that Huggies had contravened Part 3, section 18 (wages); Part 4, section 40 (wages); Part 5, section 45 (statutory holiday pay); and Part 8, section 63 (compensation for length of service) of the *Act* in respect of the employment of Syeda Nizami (“Ms. Nizami”) and Sameena Shahid (“Ms. Shahid”) (collectively, the “Complainants”), and ordered Huggies to pay wages to the Complainants in the total amount of \$5,179.82, inclusive of accrued interest. The Corporate Determination also levied administrative penalties against Huggies in the amount of \$1,500.00 pursuant to section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) for contraventions of sections 18 and 45 of the *Act* and section 46 of the *Regulation*. The total amount of the Corporate Determination is \$6,679.82.
3. The time for appealing the Corporate Determination expired on December 2, 2013, with Huggies filing its appeal after the expiry date on December 30, 2013.
4. Huggies appeals the Corporate Determination on the sole ground that the Director failed to observe the principles of natural justice in making the Corporate Determination. Huggies has also submitted reasons for its late appeal.
5. On January 3, 2014, the Employment Standards Tribunal (the “Tribunal”) acknowledged to the parties that an appeal had been received from Huggies, requested production of the section 112(5) “record” from the Director and notified the parties that no submissions were being sought from the other parties pending review by the Tribunal of the question of whether to extend the deadline for Huggies to file its appeal.
6. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will assess this appeal based solely on the Reasons for the Determination (the “Reasons”), the Appeal Form, the written submissions of Huggies made by its Director, Mansoorah Chaudhry (“Ms. Chaudhry”), and the “record” that was before the Director when the Corporate Determination was being made. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Ms. Shahid, Ms. Nizami will and the Director may be invited to file a reply to the question of whether to extend the deadline for Huggies to file the appeal. Conversely, if it is found that the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

7. The issue at this stage of the appeal is whether to extend the deadline for Huggies to file its appeal.

THE FACTS

8. Huggies operated a day care centre and was incorporated on May 12, 2010, with Ms. Chaudhry as its sole Director and Officer. Ms. Shahid was employed as an Early Childhood Education Teacher and Manager with Huggies from September 2011 to December 21, 2012. Ms. Nizami was employed as an Early Childhood Education Teacher with Huggies from October 5 to December 20, 2012. Both Complainants filed their complaints under section 74 of the *Act* against Huggies, alleging that Huggies failed to pay them wages, including statutory holiday pay, vacation pay and, in the case of Ms. Shahid, overtime for her last day of work on December 21, 2012 (the “Complaints”).
9. In their Complaints, the Complainants claimed that their paycheques for the period December 1 to December 15, 2012, were dishonoured by the bank and they were not paid for their final pay period commencing December 16, 2012, until their last days of work. The Complainants argued that they were required to quit their job after several unsuccessful attempts to contact Huggies and, particularly, Ms. Chaudhry. The delegate summarizes in the Reasons the Complainants emails to Ms. Chaudhry evidencing their efforts to collect wages they were owed.
10. On April 12, 2013, the delegate sent Huggies a registered letter, to the attention of Ms. Chaudhry, at Huggies’ operating address in Delta, British Columbia, advising Huggies of the Complaints and requesting Huggies’ response to the Complaints or payment. The delegate also made a Demand for Employer Records pertaining to the Complainants. In response to her letter, the delegate notes Ms. Chaudhry telephoned her and advised that she was unable to comply with the request for payment of monies owing to the Complainants. Ms. Chaudhry then followed up the telephone call with a letter of May 5, 2013. In this letter, which forms part of the record, Ms. Chaudhry advised that she did not have the employee records demanded, and blamed the Complainants for removing records from Huggies’ business premises. Ms. Chaudhry also blamed the Complainants for the closure of Huggies’ day care, and claimed that she was broke “with no money” and her “checks” have bounced and she is “under debt” and looking for employment. She also stated that when she gets work, she “will be in a position for settlement”.
11. On May 29, 2013, the delegate wrote to Ms. Chaudhry again regarding the status of the Complaints and advised her that a determination would be issued and penalties assessed if she did not hear from Ms. Chaudhry or if the Complaints remained unresolved. In response, Ms. Chaudhry telephoned the delegate and advised her that she was unable to pay the Complainants. Thereafter, the delegate did not hear from Ms. Chaudhry and the latter did not submit any evidence refuting the claims made by the Complainants.
12. Subsequently, relying upon the best evidence available to her which was largely the evidence provided by the Complainants, the delegate made the Corporate Determination on October 25, 2013, holding that Huggies failed to pay the Complainants wages, statutory holiday pay, annual vacation pay, compensation for length of service and, in the case of Ms. Shahid, overtime pay. The delegate also levied three (3) administrative penalties against Huggies in the amount of \$500.00 each for breach of sections 18 and 45 of the *Act* and section 46 (failure to produce records) of the *Regulation*.

SUBMISSIONS OF HUGGIES

(a) Submissions relating to the late appeal

13. Ms. Chaudhry, on behalf of Huggies, makes two (2) separate submissions. The first pertains to Huggies’ late appeal and the second pertains to the merits of Huggies’ appeal.

14. With respect to the late appeal, Ms. Chaudhry claims that she was so “confused and overwhelmed with so much documentation” that she did not know which date of appeal applied. She attaches her letter dated December 1, 2013, which was received by the delegate on December 3, 2013. In this letter, she states that she received the delegate’s letter “on Determination dated November 22, 2013” which set out “last date for appeal is December 30, 2014 [sic]”. Ms. Chaudhry goes on to also state that in the delegate’s previous letter dated October 25, 2013, it is indicated that the “last date for appeal is December 2, 2013” and this has caused her confusion and, therefore, she requires clarification because she wants to “appeal against Determination [sic]”.
15. Ms. Chaudhry also attaches a response letter, dated December 4, 2013, from the delegate wherein the latter explained that Ms. Chaudhry has received two (2) determinations, dated October 25 and November 22, 2013. The determination against Huggies (the Corporate Determination) is dated October 25, 2013, and the appeal date for this appeal is December 2, 2013. In respect of the second determination, dated November 22, 2013, this determination is filed against Ms. Chaudhry personally and in her capacity as a Director and Officer of Huggies (the “Section 96 Determination”), and the appeal date for the Section 96 Determination is December 30, 2013.

(b) Submissions relating to the merits of the appeal

16. With respect to the merits of the appeal, as indicated previously, Huggies appeals on the basis that the delegate failed to observe the principles of natural justice in making the Corporate Determination. In support of that ground appeal, Ms. Chaudhry has presented a single page of written submissions containing six (6) short paragraphs which I propose to set out verbatim below:
1. That the Determination made by the Director of Employment Standards is not based on facts of the case and is therefore not commensurate with the principles of natural justice.
 2. That the two employees namely Syeda Nizami and Sameena Shahid have stated the wrong facts before the Director and claimed wrong wages.
 3. That the said two employees have inflicted irreparable damage to the working of the Day Care resulting in immense pecuniary loss by acting against the interests of the Day Care, reporting wrongly to the authorities that resulted in the canceling of its license, and by removing the records of the Day Care that was [sic] in their custody as a trust.
 4. That the said two employees made a secret plan to leave the Day Care all of a sudden leaving the Day Care in doldrums where the employees are required to provide care to the kids on daily basis without break. If they were intent on leaving the Day Care for some good reason, they should have done so by extending a valid notice of resignation well in time. By all fair standards, they were required to submit a notice with sufficient time period that should have enabled the Day Care to substitute them with employees of equal competency and to train the new ones sufficiently.
 5. That the said employees should have come to the Director to claim their wages with clean hands and good intent. I am ready to pay their genuine wages but they should be asked to explain their conduct that made the Day Care to suffer [sic] as a result of its closure.
 6. That the Determination has accommodated only one-sided view and did not heed to what I had to say in response to the one-way claims. It is therefore requested that I may be heard personally while the said Determination be declared as one-sided and the one that includes harsh penalty beyond the expectation of a normal employer of a very small scale [sic].

ANALYSIS

17. Section 112(3) of the *Act* delineates appeal deadlines to ensure appeals are dealt with promptly. In the case of determinations served on a person by registered mail, subsection 112(3)(a) of the *Act* provides that the appeal period is “30 days after the date of service of the determination”. In this case, Huggies was sent the Corporate Determination by registered mail, and the Corporate Determination, at page 2, states “(s)hould you wish to appeal this Determination, your appeal must be delivered to the Employment Standards Tribunal by 4:30 pm on December 2, 2013”. However, Huggies failed to comply with the stated deadline and filed its appeal 28 days past the expiry date on December 30, 2013.
18. Section 109(1)(b) of the *Act* permits the Tribunal to extend the time limit for an appeal. In *Re: Tang*, BC EST # D211/96, the Tribunal explained the principles governing the exercise of its discretion under this section as follows:
- 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 extension 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 *Blue World IT Consulting Inc.*, BC EST # D516/98, the Tribunal delineated the following non-exhaustive factors it may consider in deciding whether to grant an extension of the appeal:
- 1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - 2) there has been a genuine and ongoing *bona fide* intention to appeal the Determination;
 - 3) the respondent party (i.e. the employer or the employee) as well as the Director of Employment Standards, must have been made aware of this intention;
 - 4) the respondent party will not be unduly prejudiced by the granting of the extension; and
 - 5) there is a strong *prima facie* case in favour of the appellant.
20. Having reviewed all of the considerations above in context of the facts in this case and for the reasons delineated below, I am not persuaded that this is a case where the Tribunal should exercise its discretion to grant an extension of time to file an appeal.
21. First, I am not persuaded that there is a reasonable and credible explanation for Huggies’ failure to request an appeal within the statutory time limit. Ms. Chaudhry does not deny receiving the Corporate Determination in a timely fashion. As indicated previously, the Corporate Determination clearly set out the expiry of the appeal period as December 2, 2013. While I appreciate that Ms. Chaudhry says that she was confused because the Section 96 Determination set out a different expiry date for an appeal, I believe that if she had carefully read the Section 96 Determination (issued on November 22, 2013), she would quite easily have seen that this determination was against her in her personal capacity as a Director and Officer of Huggies. This Section 96 Determination was sent to her by registered mail on November 22, 2013, and it is clear that the Section 96 Determination had a separate appeal date; namely, December 30, 2013.
22. Second, I am not persuaded that there is any evidence of a genuine and ongoing *bona fide* intention on the part of Huggies or Ms. Chaudhry to appeal the Corporate Determination during the appeal period. While I note that Ms. Chaudhry indicates that her written submissions are dated November 25, 2013, I am not clear as to why she would have held onto those submissions for over one month before filing them with Huggies’ late

appeal. It appears to me that Ms. Chaudhry was more likely motivated to appeal the Corporate Determination when she received the Section 96 Determination.

23. Third, the Director was not aware of Huggies' intention to appeal the Corporate Determination until a day after the expiry of the appeal period for the Corporate Determination when the delegate received Ms. Chaudhry's letter expressing her confusion with respect to the two (2) appeal dates. I note that in Ms. Chaudhry's letter of December 1, 2013, to the delegate, she states that "I want to appeal against Determination". Why would Ms. Chaudhry not have enclosed her written submissions if they were prepared already on November 25, 2013? She did not add anything more to those written submissions when she submitted Huggies' late appeal.
24. Fourth, while there may not be any prejudice to the Complainants in granting Huggies an extension of time to appeal, the Tribunal needs to be mindful of the need for a timely disposition of an appeal, as well as the stated purpose in section 2(c) of the *Act*, which is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*". In this case, even if I were persuaded by Ms. Chaudhry's explanation for the delay in Huggies' filing of its appeal (and invited submissions from the Complainants as well as the Director on the subject), I do not find that there is any prospect of success of Huggies' appeal, which I will briefly discuss below.
25. The last factor for consideration set out by the Tribunal in *Blue IT Consulting Inc., supra*, is whether there is a strong *prima facie* case, in favour of the applicant, that warrants a granting of an extension of the appeal period. In this case, I do not find there to be any evidence whatsoever of a breach of natural justice by the delegate. The delegate did invite Ms. Chaudhry to respond to the Complaints and provide employer records on at least two (2) occasions, but to no avail. This appears to be a case of an employer "lying in the weeds" and now presenting evidence it should have presented before the Corporate Determination was made.
26. I also note that none of the evidence presented by Ms. Chaudhry qualifies as new evidence under the Tribunal's test for admitting new evidence set out in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03. In particular, all of the evidence Ms. Chaudhry now adduces on behalf of Huggies is evidence that could have, with the exercise of due diligence, been presented to the delegate during the investigation or adjudication of the Complaints and prior to the Corporate Determination being made. The Tribunal will not consider evidence, in the context of an appeal, which could have been provided at the investigation stage and before the determination was made (see *607470 BC Ltd. carrying on business as Michael Allen Painting*, BC EST # D096/07).
27. In these circumstances, I am not persuaded that there is a reasonable prospect that Huggies' appeal will succeed.

ORDER

28. Pursuant to section 114(1)(b) and (f) of the *Act*, I dismiss the appeal of Huggies Buggies Day Care Inc. on the grounds that it has not been filed within the applicable time limit and there is no reasonable prospect that it will succeed. Accordingly, pursuant to section 115 of the *Act*, I order the Corporate Determination, dated October 25, 2013, be confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal