

Appeals

- by -

0388025 B.C. Ltd. carrying on business as Edgewater Inn

- and -

Dagmar Giroday a Director or Officer of 0388025 B.C. Ltd. carrying on business
as Edgewater Inn

- of Determinations 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: Raewyn Brewer

FILE No.: 2011A/173 & 2011A/174

DATE OF DECISION: February 15, 2012

DECISION

SUBMISSIONS

Dagmar Giroday	on her own behalf, a Director or Officer of 0388025 B.C. Ltd. carrying on business as Edgewater Inn and on behalf of 0388025 B.C. Ltd. carrying on business as Edgewater Inn
Stephen Brechin	on his own behalf
Amanda Clark Welder	on behalf of the Director of Employment Standards

OVERVIEW

1. 0388025 B.C. Ltd., carrying on business as Edgewater Inn (“Edgewater”), has appealed a determination (the “Corporate Determination”) of the Director of Employment Standards (the “Director”) issued October 12, 2011, ordering it to pay a total of \$7,253.40, representing wages, unauthorized deductions and accrued interest owed to Mr. Brechin; and four administrative penalties totalling \$2,000 for contraventions of Sections 16, 21, 40 and 46 of the *Employment Standards Act* (the “*Act*”). Ms. Giroday, the sole director/officer of Edgewater, also appealed a companion determination (the “Director Determination”) issued the same day, ordering her to pay \$9,253.40.
2. Both appeals were filed late. Each was required to be delivered to the Employment Standards Tribunal (the “Tribunal”) by 4:30 pm on November 21, 2011. They were in fact received by the Tribunal on November 22, 2011.
3. Having said this, section 109(1)(b) of the *Act* clothes the Tribunal with the power to extend the deadline for requesting an appeal even though the appeal period has expired. In this decision, the Tribunal will only consider the issue of whether or not it should exercise its discretion and extend the deadline to appeal. If the Tribunal grants the request to extend the deadline to appeal, the Tribunal will afford the parties a full opportunity to respond to the merits of the appeal, although Ms. Giroday has made extensive submissions in this regard.
4. Ms. Giroday stated she did not know the grounds of the appeals, so she attached a lengthy letter to the appeal form outlining her submissions. In my view, as her submissions focus on the “inadequacy” of the evidence before the delegate and her contention that additional evidence exists that was not considered by the Director’s delegate, the grounds of her appeal are best identified as (a) a breach of natural justice by the Director in making the Determinations and (b) evidence that was not available at the time the Determinations were being made.
5. Ms. Giroday and Edgewater also sought a suspension of both the Director Determination and the Corporate Determination pursuant to Section 113 of the *Act* pending the outcome of the appeals. The applications for suspension were denied by this Tribunal in decision BC EST # D002/12 dated January 10, 2012 (the “Suspension Decision”).

ISSUE

6. The issue to be determined by the Tribunal at this time is: should the Tribunal use its power under section 109(1)(b) of the *Act* and extend the time period for requesting an appeal even though the appeal period has expired?

FACTS

7. On August 8, 2010, Mr. Brechin filed a complaint alleging that Edgewater contravened the *Act* by failing to pay wages and vacation pay for work he performed during the period May 13 to August 13, 2010.
8. A delegate conducted an investigation into the matter beginning in November 2010. The record evidences that in December 2010 and January 2011 Ms. Giroday participated in the investigation by telephone and submitted a seven page written submission. Ms. Giroday also provided the delegate with names and contact information of witnesses on her behalf. It is clear that the delegate was diligent in contacting Ms. Giroday by telephone, letter and email during the investigation, including following up on multiple occasions regarding the Demand for Records.
9. On September 1, 2011, the delegate issued a preliminary findings letter that was sent to the business and registered and records office of Edgewater (the “First Letter”). The First Letter outlined the evidence of Mr. Brechin and Edgewater that was before the delegate. The delegate found on the evidence before her that Mr. Brechin was owed \$5,269.52 in wages. In addition, the delegate stated that administrative penalties would be levied against Edgewater and that Ms. Giroday, as a director of Edgewater who was responsible for making business decisions, would be personally liable for the outstanding wages and administrative penalties. On September 2, 2011, a copy of the First Letter was sent to Ms. Giroday at two addresses, including her current Diamond Road address, which she also provided for the purposes of these appeals.
10. On September 16, 2011, another letter was sent by both regular and registered mail to the business and registered and records office of Edgewater and to Ms. Giroday at two addresses, including her Diamond Road address (the “Second Letter”). The Second Letter advised Ms. Giroday that the delegate who had conducted the investigation and written the First Letter had taken a leave and the file had been transferred to a new delegate. The Second Letter also enclosed a copy of the First Letter, together with copies of the documentary evidence and argument submitted by both parties and relied upon by the delegate. In her preliminary analysis, the delegate found Mr. Brechin was owed \$7,012.56 in wages. The delegate also stated that if a determination was issued, administrative penalties would be levied against Edgewater and that Ms. Giroday, as a director of Edgewater who authorized, permitted or acquiesced in a contravention of the *Act*, would be personally liable for the outstanding wages and administrative penalties. The Second Letter concluded with a section titled “Opportunity to Respond” which invited both parties to submit final written submissions by September 30, 2011. The date is in bold text. The delegate received no response from Edgewater or Ms. Giroday.
11. On October 12, 2011, the Delegate issued the Corporate Determination. The issues before the delegate were whether or not Mr. Brechin was a kitchen manager and thus not entitled to overtime and vacation pay; the amount of wages he was entitled to, if any; and whether the deductions from his pay for rent constituted an unauthorized deduction. The delegate concluded that Mr. Brechin was not a manager, he was entitled to wages (including interest) in the amount of \$7,253.40, and that Edgewater had deducted accommodation costs from wages, contrary to section 21 of the *Act*. Four administrative penalties totalling \$2,000 for contraventions of the *Act* were also levied against Edgewater.

12. The delegate also issued a Director Determination against Ms. Giroday on October 12, 2011. The Director determined that, as the director and officer of Edgewater at the time the wages owed to Mr. Brechin were earned or should have been earned, Ms. Giroday was personally responsible for two months unpaid wages, plus interest in the amount of \$7,253.40. In addition, the delegate determined that Ms. Giroday authorized, permitted or acquiesced in the contraventions of the *Act* and was therefore personally liable to pay the administrative penalties.
13. On November 22, 2011, Ms. Giroday appealed the Corporate Determination and the Director Determination.

SUBMISSIONS OF EDGEWATER AND MS. GIRODAY

14. Ms. Giroday submits that the Tribunal should extend the time for filing the appeals. Ms. Giroday filed identical reasons for appeal on both the appeals.
15. Ms. Giroday submits there was a good reason why the appeals were late. According to Ms. Giroday, she attempted to file both appeals by email on November 21, 2011 by 4:30 pm. However, due to a series of technical or clerical errors she made due to inexperience, borrowed equipment, and stress, she was unable to successfully email her appeals until the morning of November 22, 2011. Ms. Giroday includes a number of printouts from her email in support of this contention. Ms. Giroday also details calls she made to the Tribunal's Registry Administrator throughout the day of November 21, 2011, as she ran into difficulties.
16. Ms. Giroday submits one day is not an unreasonable delay and that she always intended to appeal both the Corporate Determination and the Director Determination, citing phone calls she made to the Employment Standards Branch in Kelowna (the "Branch") and the Tribunal in support. Ms. Giroday notes that she has had no contact with Mr. Brechin and was not aware that it was necessary to inform him of her intent to appeal. Ms. Giroday also states that extending the time to appeal would not harm Mr. Brechin's case as in her opinion he has received all wages owing to him.
17. While the focus of these appeals is whether to allow Edgewater and Ms. Giroday an extension of time to appeal, I note that the analysis involved in determining this issue requires that I review the substantive submissions of Ms. Giroday. This is because one of the relevant and most highly probative factors in the exercise of my discretion to grant an extension of time to appeal is consideration of whether there is a strong *prima facie* case in favour of the appellant, in this case Edgewater and Ms. Giroday.
18. Ms. Giroday contends that she and Edgewater have a "very strong" case that might succeed if the Tribunal grants an extension. Ms. Giroday does not specify on the appeal forms the ground(s) of appeal, rather she attaches a lengthy letter that details her submissions. I have reviewed Ms. Giroday's substantive submissions very carefully. In my view, Ms. Giroday's grounds of appeal are twofold: (1) the Director failed to observe the principles of natural justice in making the Determination; and (2) evidence has become available that was not available at the time the Determination was made. Neither appeal includes any submissions that could be construed as alleging the Director erred in law in applying the appropriate legal tests nor has Ms. Giroday disputed that she was a director or officer of Edgewater at the time the wages were earned or became payable to Mr. Brechin.
19. With respect to the natural justice ground of appeal, Ms. Giroday states that she "would very much like to be given a chance to properly defend herself" and that she "did not know that this case was proceeding". She refers to a number of personal, financial, and business challenges that she has faced since the complaint was

filed that adversely impacted her ability to participate in the investigation. Ms. Giroday also states that she did not receive all correspondence from the Director because she moved in March 2011.

20. In terms of the new evidence ground of appeal, Ms. Giroday's submissions include a statement from a food supplier familiar with Mr. Brechin, a resume of Mr. Brechin's, copies of an order entry inventory sheet, and a menu from another restaurant where Mr. Brechin had worked. Each is submitted by Ms. Giroday as evidence that Mr. Brechin was working at Edgewater as a kitchen manager and therefore is exempt from the entitlement to overtime wages and statutory holiday pay under the *Act*.
21. The majority of Ms. Giroday's submissions address additional facts and evidence that Ms. Giroday would like the opportunity to present. In Ms. Giroday's view, the evidence that the Determination was based on was "inadequate" and "false". Specifically, Ms. Giroday includes additional witness names, background information on the witnesses who were contacted, and a request for additional time to produce Mr. Brechin's employment records, originally required as per the two Demands for Records dated November 15 and December 1, 2010.

SUBMISSIONS OF MR. BRECHIN

22. Mr. Brechin opposes the applications to extend the appeal deadline. Mr. Brechin argues that Ms. Giroday waited to the last day to file the appeals and has no valid excuse for not getting them in on time. According to his submissions, Ms. Giroday had ample opportunity to present evidence during the investigation and extending the appeal period would harm his case as he has relocated to Alberta and he has waited since August 2010 to receive the wages owed to him.
23. Mr. Brechin's submissions also include direct responses to substantive submissions made by Ms. Giroday in the appeals. I do not find it necessary to set them out in this decision.

SUBMISSIONS OF THE DIRECTOR

24. The Director submits that the Tribunal should deny Ms. Giroday's and Edgewater's requests for an extension of the appeal period. In support of this submission, the Director addresses each of the six factors that the Tribunal may consider and argues that Ms. Giroday has not demonstrated suitable grounds on which the Tribunal should extend the time period for filing the appeals.
25. First, the Director submits that Ms. Giroday failed to provide any reasonable explanation as to why she waited until the last day of the appeal period to attempt to send her appeals to the Tribunal and did not provide any valid reason as to why she could not have met the appeal deadline.
26. The Director submits that the delay in filing the appeals was not unreasonable and that Ms. Giroday's conversation with a delegate indicated she intended to file the appeals. However, the Director notes that the delegate who issued the Determination was not specifically advised of her intent to appeal. The Director submits that extending the appeal deadline harms Mr. Brechin's case as it further lengthens the time until Mr. Brechin receives the outstanding wages.
27. Lastly, the Director submits that Ms. Giroday does not have a strong case that might succeed if the Tribunal grants an extension to appeal. The Director interprets Ms. Giroday's submissions as alleging that the Director failed to observe the principles of natural justice in making the Determinations and that Ms. Giroday further seeks to introduce new evidence and argument to address the merits of the complaint.

28. As concerns the natural justice ground of appeal, the Director submits that as set out in the Determination and the record, several opportunities were provided through the course of the investigation for Ms. Giroday to participate and provide evidence and argument to support her position. The Director points specifically to the Second Letter that set out all the evidence, enclosed copies of source documents, afforded Ms. Giroday an opportunity to respond, and advised of the consequences should no response be received.
29. The Director notes that the appeal process is not intended to provide a party with an opportunity to have the complaint reinvestigated nor to address deficiencies in the case the party presented to the delegate.
30. As to the new evidence ground of appeal, the Director submits that the new evidence and argument put forth by Ms. Giroday does not meet the test for admitting new evidence. The Director notes that Ms. Giroday did not provide any valid or substantiated reason why this evidence could not have been produced during the investigation, the evidence is not credible on its face, and it does not have high probative value.

ANALYSIS

31. Section 112 of the *Act* is the code for any party wishing to appeal the Director's determination including the appeal period or time limit for filing an appeal. The *Act* imposes an appeal deadline of 21 or 30 days depending on whether the determination was served personally or by registered mail. This deadline ensures appeals are dealt with in a fair and efficient manner.
32. Having said this, section 109(1)(b) of the *Act* clothes the Tribunal with the power to extend the deadline for requesting an appeal even though the appeal period has expired. Such extensions are not granted as a matter of course and the Tribunal will only exercise its statutory discretion to extend the time for filing an appeal where there are compelling reasons to do so (*Re: Tang*, BC EST # D211/96). Further, the burden is on the appellant to show such compelling reasons exist.
33. The Tribunal has developed a principled approach to the exercise of its discretion and has previously considered the following factors in determining whether to extend an appeal period (*Re: Niemesto*, BC EST # D099/96):
- a. Is there a good reason why the appellant (Edgewater and Ms. Giroday) could not meet the deadline?
 - b. Was there an unreasonably long delay in filing the appeal?
 - c. Did the appellant always intend to appeal the determination?
 - d. Were the other parties – such as the respondent (Mr. Brechin) and the delegate who wrote the determination – aware of the intent to appeal?
 - e. Would extending the appeal deadline harm the respondent's case?
 - f. Does the appellant have a strong case that might succeed if the Tribunal grants an extension?
34. I have reviewed these considerations in the context of the facts of this case and the submissions of the parties. For the reasons delineated below, I am not satisfied that the time period for Ms. Giroday and Edgewater to file an appeal ought to be extended.
35. In respect of the first factor, I find that Ms. Giroday attempted to file the appeals on November 21, 2011, the statutory deadline for filing the appeals. Due to her inexperience, stress and use of unfamiliar technology, Ms. Giroday made a series of mistakes when she tried to email the appeals to the Tribunal on the due date. Therefore, they were not successfully sent until the next day, November 22, 2011. In the circumstances, I am

prepared to accept her reasons as truthful. In the sense of being reasonable, however, the explanation is very close to failing to pass muster. The problem only arose because Ms. Giroday left it to the last moment to file the appeals.

36. Second, the length of delay – one day – was not unreasonable.
37. Third, based on her submissions and those of the Director, I find Ms. Giroday demonstrated a genuine and ongoing intention to appeal the Determination. Ms. Giroday contacted the Branch on two separate occasions to inquire about the appeal process (November 2 and November 14, 2011) and she also spoke to the Tribunal's Registry Administrator several times on November 21, 2011, as she attempted unsuccessfully to file the appeals.
38. In respect of the fourth factor, I find that Ms. Giroday did communicate her intentions to a delegate at the Branch, albeit not the delegate that wrote the Determinations. She did not make Mr. Brechin aware of her intention to appeal, although it does not seem unusual to me that an appellant, especially not one represented by legal counsel, would choose not to contact the respondent directly after an unfavourable determination.
39. Fifth, I accept that Mr. Brechin would be inconvenienced if an extension were granted as it would delay his ability to recover any outstanding wages. However, I am not persuaded that he will be unduly prejudiced given that the appeal was submitted only one day after the appeal deadline.
40. Lastly, I must consider whether Ms. Giroday has a strong *prima facie* case which might succeed if I extend the time period for requesting an appeal even though the appeal period has expired. As stated recently by the Tribunal, this last

inquiry flows from the section 2 purposes of the *Act* and, in particular, the need for fair treatment of the parties and fair and efficient dispute resolution procedures. Simply put, it is neither fair nor efficient to put parties through the delay and expense of an appeal process where the appeal is doomed to fail (*Re: Knodel (c.o.b. as Home Delivery)*, BC EST # D083/11).

41. Similar to the finding of this Tribunal in the Suspension Decision that the appeal is without merit, I am not persuaded that the appellant has a strong case that might succeed if the Tribunal grants an extension.
42. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.
43. While Ms. Giroday did not specify the grounds for either appeal, regarding ground (a) that the Director erred in law, in my view, Ms. Giroday's submissions could only be considered a re-argument of her case and a challenge to the Director's findings of fact with a view to obtaining a more favourable decision. The *Act* does not provide for an appeal based on errors of fact and the Tribunal does not consider such appeals unless such findings raise an error of law (*Re: Britco Structures Ltd.*, BC EST # D260/03). In my view, the delegate properly interpreted the *Act* and the evidence adduced by the parties during the investigation reasonably supports the Delegate's findings of facts.

44. Ground (b) requires the Director to observe the principles of natural justice in making the Determination. In *Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05, the Tribunal explained that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence, the right to receive reasons for the decision, and the right to be heard by an independent decision-maker.
45. I find nothing in Ms. Giroday's materials to support the natural justice ground of appeal. Ms. Giroday contends that she did not have a chance to properly defend herself and she was not aware the case was proceeding to a determination, as she was not receiving her mail.
46. However, the record demonstrates that Ms. Giroday participated in the investigation by telephone in December 2010 and January 2011 and submitted a seven page written response to the delegate on December 18, 2010. When Ms. Giroday moved in March 2011 it was her responsibility to update her contact information with the Branch. Regardless, it is not in dispute that Edgewater and Ms. Giroday received the Second Letter which clearly identified the issues and preliminary findings of the delegate. The Second Letter also enclosed a copy of the First Letter, together with copies of the documentary evidence and argument submitted by both parties. As noted, the Second Letter concluded with a section titled "Opportunity to Respond" which invited both parties to submit final written submissions by September 30, 2011. The date is in bold text. The delegate received no response from Edgewater or Ms. Giroday.
47. Therefore, it is clear from the record that Ms. Giroday and Edgewater were aware of the investigation, knew the nature of the evidence before the delegate, had ample opportunity to present evidence to support their position, had notice of the delegate's preliminary conclusions and were provided with all of the relevant evidence in a timely fashion.
48. Finally, with respect to the third ground of the appeal, that new evidence is available regarding Mr. Brechin's status as a kitchen manager and his hours of work, pay and deductions in the form of his employment records, I find this evidence would not meet the strict fresh evidence test as articulated by the Tribunal.
49. In *Re: Davies et al (Merilus Technologies Inc.)* BC EST # D171/03, the Tribunal set out the following test regarding the ground for "new evidence":

This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

50. In my view, none of the pieces of evidence submitted by Ms. Giroday in these appeals meet the fresh evidence test. Similarly, none of the arguments made by Ms. Giroday with respect to previously introduced evidence meet the fresh evidence test. Rather, Ms. Giroday simply seeks to supplement what was already provided to, or acquired by, the Director during the complaint process. Ms. Giroday gives no reasonable or credible reason why such evidence and argument could not have been produced during the course of the investigation or, at the latest, after she and Edgewater received the Second Letter dated September 16, 2011. Ms. Giroday points to a number of financial, personal, and business difficulties she was having, together with an unwillingness to participate out of fear of personal or professional embarrassment. While I sympathize with Ms. Giroday, this litany of explanations provided fails to meet the first condition for the admission of new evidence.
51. In addition, with respect to the records of employment for Mr. Brechin, Ms. Giroday had already provided multiple reasons as to why they could not be produced during the investigation. I therefore find that any evidence produced in this regard would be not credible in the sense that it would not be reasonably capable of belief.
52. In my view, this final factor is the most probative with respect to the appeals before me. While several of the factors may weigh marginally in favour of extending the appeal period, this is not a compelling case for the Tribunal to exercise its discretion. Extending the deadline would be neither fair nor efficient as the parties would be put through the delay and expense of an appeal process for a case without merit.
53. For the above reasons, I am not prepared to extend the period for filing the appeals. Consequently, the appeals were filed out of time and are dismissed on that basis.

ORDER

54. Pursuant to section 109(1)(b) of the *Act*, I deny the applications of Ms. Giroday and Edgewater to extend the time for filing the appeals.

Raewyn Brewer
Member
Employment Standards Tribunal