

An appeal

- by -

Birla Investments Ltd.
("Birla")

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2004A/211

DATE OF DECISION: February 3, 2005

DECISION

SUBMISSIONS

Harinder Bal	on behalf of Birla Investments Ltd.
Karyn Luttmer	on behalf of the Director of Employment Standards
Lisa Hogen	on her own behalf

OVERVIEW

This is an appeal by Birla Investments Ltd. ("Birla") pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director").

A number of complaints were filed with the Employment Standards Branch alleging that Birla had contravened the *Act* by failing to pay minimum wage, regular and overtime wages, statutory holiday pay and compensation for length of service.

A delegate of Director of Employment Standards ("the Director") investigated the complaints. In a Determination issued April 20, 2004, the delegate concluded that Birla had contravened sections 16, 40, 45, 46 and 63 of the *Act*, and ordered that it pay wages and interest in the total amount of \$1,707.21 to the complainants. The delegate also imposed administrative penalties in the total amount of \$2,000.

The deadline for filing an appeal of the Determination was May 11, 2004. The Tribunal received Birla's appeal on December 7, 2004.

ISSUE

Whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

FACTS AND ARGUMENT

Birla operates a cold wine and beer store, and lounge/restaurant in the Somass Hotel in Port Alberni. The four complainants worked in various capacities in the facility.

The complainants provided some evidence of their claims. Birla claimed that, with respect to two of the complainants, no money was owed. Birla provided no other details or information. Birla advised the delegate that it did not intend to respond to the remaining two complaints, and no other information was provided. In the absence of any information from Birla, the delegate issued her Determination based on the information provided by the complainants.

Birla submits that new evidence has become available that was not available at the time the Determination was being made. It submits that the Determination was made "without any verification from our side".

Birla, through its representative, Mr. Bal, submits that the appeal is late because he was not served with the Determination. Mr. Bal says that he first became aware of the Determination when the Director commenced enforcement proceedings, and his bank received a demand notice.

Mr. Bal says that the hotel's bookkeeper was responsible for responding to the delegate's requests for information, and that he was unaware of the correspondence between them. He submits that all of the complainants have been paid, and that he has proof that they have been paid.

The delegate submits that, on April 20, 2004, she personally served the Determination on Viola Cloutier, a Birla representative, at the Somass Hotel. On May 12, 2004, Birla responded to the Determination by way of a fax to the Nanaimo Employment Standards Branch. That letter, signed by Mr. Bal, stated that all of the amounts owing to the parties had been paid. The letter continues "If this is not agreeable, I want to know how I appeal this action". On May 13, 2004, the Branch responded to Mr. Bal's letter, indicating that the appeal period had expired, and that any appeal had to be sent to the Employment Standards Tribunal. The letter set out the Tribunal's telephone number.

The delegate also submits that the Determination was hand delivered to the last known address of the company, which was also the primary residence of Mr. Bal and his wife, Ararjit Bal, Birla's sole Director and Officer.

The delegate submits that Mr. Bal's May 12, 2004 letter to the Branch establishes that the Determination was served. Further, the delegate submits that, although Mr. Bal was given information on how to appeal the Determination again on May 13, 2004, he did not file his appeal until December 7, 2004, seven months after the appeal period had expired.

Furthermore, the delegate says that a Demand for Employer records was served on Birla by registered mail on October 16, 2003, and on Mr. Bal personally on December 12, 2003 at a meeting at the Somass Hotel. She says that Mr. Bal had her removed from the premises and told her never to return. She says that Birla was given two further opportunities to participate in the investigation, and did not do so. Finally, she says that a Determination against Ms. Bal, the company Director, was issued on May 10, 2004. That Determination was sent by registered mail, and signed for by Ms. Bal.

The delegate submits that the request for an extension of time to appeal undermines the intent of the Act, which is to resolve complaints and appeals promptly and through a fair and impartial process. She submits that Mr. Bal's statement that he was unaware of the Determination is not credible in light of the company's May 12, 2004 fax to the Branch and the Canada Post delivery confirmation of the Determination against Ms. Bal.

The delegate submits that Birla's request for an extension of time should be denied.

Ms. Hogan also submits that the extension request should be denied.

ANALYSIS AND DECISION

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; or
- (c) evidence has become available that was not available at the time the determination was being made

Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.

In *Niemisto* (ESTD#099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those are that the party seeking an extension must satisfy the Tribunal that:

- (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, ongoing *bona fide* intention to appeal the determination;
- (3) the respondent party as well as the director has been made aware of this intention;
- (4) the respondent party will not be unduly prejudiced by the granting of an extension; and
- (5) there is a strong *prima facie* case in favour of the appellant.

These criteria are not exhaustive.

Furthermore, extensions will only be granted where there are compelling reasons present (*Moen and Sagh Contracting Ltd.*) BC EST #D298/96)

I am not persuaded that an extension of time should be granted.

The primary basis for Birla's request for an extension of time to file the appeal is Mr. Bal's assertion that he was unaware of the Determination until enforcement proceedings had commenced. The evidence does not support his assertion. I am satisfied that Birla was aware of the Determination at least by May 12, 2004, the date of Mr. Bal's fax to the Nanaimo Employment Standards Branch office.

Information on how and where to file an appeal was contained in the Determination, and again in the Branch's response letter dated May 13, 2004. I am not satisfied there is a reasonable and credible explanation for Birla's failure to request an appeal within the statutory time limit.

While I accept that Mr. Bal intended to appeal the Determination, as evidenced by his statement in the May 12, 2004 letter, I am not persuaded that was a genuine or ongoing *bona fide* intent, as he did not act on that intent for seven months.

Furthermore, given that enforcement proceedings have begun, I find that the director will be prejudiced by the granting of an extension.

Finally, I am not persuaded that there is a strong *prima facie* case in Birla's favour. The evidence is that Birla failed to participate in the investigation of the complaint despite having knowledge of the opportunity to do so.

Although Mr. Bal contends, as the basis for his appeal, that new evidence has become available since the Determination was issued, I am unable to conclude that the Employer records sought by the delegate during the investigation were unavailable during that time. Mr. Bal does not say what the “new” evidence is, or how it would support Birla’s position that the complainants had been paid. As a result, it is unlikely that Birla’s appeal on this ground would be successful in any event.

In conclusion, I find that Birla has not met the Tribunal’s criteria for extending the time for filing an appeal.

ORDER

I decline to grant Birla's application.

Carol L. Roberts
Member
Employment Standards Tribunal