

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/212

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

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 complaint was filed with the Employment Standards Branch alleging that Birla had contravened the *Act* by failing to pay regular and overtime wages, statutory holiday pay overtime pay and annual vacation pay.

A delegate of Director of Employment Standards ("the Director") investigated the complaint, and, at the same time, included other employees in the investigation by way of an audit to protect the identity of the complainant, whose employment was continuing. In a Determination issued October 6, 2004, the delegate determined that Birla had contravened sections 36, 40, 45, 46 and 58 of the *Act*, and ordered that it pay wages and interest in the total amount of \$937.05 to the complainant. The delegate also imposed administrative penalties in the total amount of \$1,000.

The deadline for filing an appeal of the Determination was November 15, 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. A confidential complaint was filed by an employee alleging that Birla had contravened the *Act* in failing to pay regular wages, statutory holiday pay, overtime pay and annual vacation pay.

The delegate included other employees in her investigation by way of an audit to protect the identity of the complainant and to ensure compliance with the *Act*, pursuant to section 76.

On July 7, 2003, Birla provided the delegate with partial payroll records for the period 2002 to June 2003. Although the delegate subsequently obtained further records from Birla's business address, a complete set of payroll records for the November 27, 2002 to May 27, 2003 period were never obtained.

Birla did not respond to the delegate's request for a response to the complaints. In each of the requests, the delegate noted that Birla's failure to participate could result in a Determination being made based on the information provided by the complainant as well as the imposition of a penalty. Those requests were delivered by registered mail.

A company search showed Amarjit Kaur Bal as a company director. Although Mr. Bal was not listed as a company director, the delegate found that, because he was an active participant in the business and had decision making authority, he was also a director.

After a review of the documents obtained by the delegate, she determined that wages were owed as indicated above.

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 the complainant has been paid, and that he has proof that they have been paid.

The delegate submits that the Determination was served on both Birla and Mr. Bal by registered mail on October 6, 2004. The Canada Post receipt demonstrates that the Determinations were successfully delivered. The Determination served on Amarjit Bal was returned to the Branch, indicating that she had moved.

The delegate also says that a Demand for Employer records was served on Birla by registered mail on June 5, 2003, June 26, 2003 and July 22, 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. The delegate provided proof of service of these documents.

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 the Determination was made without any opportunity to respond is not credible in light of the proof of service of documents requesting information from the company.

The delegate submits that Birla's request for an extension of time 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 by October 6, 2004. The Canada Post tracking information indicates that the document was received that day. I am not satisfied there is a reasonable and credible explanation for Birla's failure to request an appeal within the statutory time limit.

There is no evidence Mr. Bal intended to appeal the Determination once it was received until the appeal documents were submitted, which was almost two weeks after the deadline for filing the appeal.

I am also 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, and warned of the consequences of failing 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 complainant had been paid. As a result, it is unlikely that Birla's appeal on this ground would be successful in any event.

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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