

An appeal

- by -

Motel Bollywood Ltd. carrying on business as Hare Creek Motel  
(“Motel Bollywood”)

- 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.:** 2012A/152

**DATE OF DECISION:** February 28, 2013

## DECISION

### SUBMISSIONS

Wayne Gunsten on behalf of Motel Bollywood Ltd. carrying on business as Hare Creek Motel

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Motel Bollywood Ltd. carrying on business as Hare Creek Motel (“Motel Bollywood”) has filed an appeal of a determination issued on November 30, 2012, (the “Determination”) by a delegate (the “delegate”) of the Director of Employment Standards (the “Director”).
2. On May 2, 2012, Satyavir Singh (“Mr. Singh”) filed a complaint under section 74 of the *Act* alleging that Motel Bollywood contravened the *Act* by failing to pay him regular wages, overtime wages, statutory holiday and compensation for length of service (the “Complaint”).
3. While the delegate conducted a hearing into the Complaint on November 15, 2012 (the “Hearing”), Motel Bollywood and its representatives were absent at the Hearing. However, before the Hearing, the delegate had some contact with the sole director of Motel Bollywood, Gurbakhsh Khatkar (“Mr. Khatkar”), as well as Motel Bollywood’s manager, Wayne Gunsten (“Mr. Gunsten”). In the Reasons for the Determination (the “Reasons”), the delegate meticulously sets out all his attempts to contact the representatives of Motel Bollywood, including those attempts that were successful. Those attempts are set out verbatim below:

June 25/12	Mr. Khatkar was advised by telephone of the complaint. He stated that the Complainant was fired for cause; did not work the hours claimed and the RCMP were involved. Referred Branch to the manager, Mr. Gunston [sic] who has full authority.  Discussed the issues with Mr. Gunston [sic] by telephone. He stated that no way was the Complainant there from October. He further stated that the Complainant was fired for ‘performing illegal acts with women in the motel, police were called and motel almost shut down’. He would fax the employment details on June 27, 2012.
June 27/12	Telephone Mr. Gunston [sic] – he is not in the office, he will call back tomorrow.
June 28/12	Telephoned Mr. Gunston [sic] – he stated that the Complainant was paid \$11.00 per hour. Mr. Gunston [sic] was invited to submit records. He agreed to mediation August 1, 2012 @ 9:00 a.m. – Mediation notice mailed.
August 1/12	Telephone Mr. Gunston [sic] – he failed to show at scheduled mediation; he said he was ‘busy and forgot’; agreed to reschedule to August 15/12.
August 15/12	Telephoned Mr. Gunston [sic] to enquire where he was as he failed to show – he stated his wife was in the hospital, he was unable to participate – rescheduled to August 17/12.

August 17/12	Advised by Mr. Gunston [sic] on the telephone that he did not have authority to settle this issue; the Branch would have to speak with the director who is Gary (Gurbakhsh Khatkar).
August 21/12	Telephoned Mr. Gunston [sic] who advised that the director, Gary [sic] had never told him he had the authority to settle. Agreed to another reschedule to September 11/12; He said he will ensure that Gary Khatkar is there. Mediation notices mailed.
September 11/12	Telephoned Mr. Gunston [sic] who said he was not aware of the mediation time despite having been mailed the notice; He refused to participate in the mediation.
September 12/12	Telephoned Mr. Khatkar and left message regarding scheduling of Adjudication.
September 13/12	Mailed Notice of Complaint hearing and Demand for Employer Records by registered mail to workplace, director Mr. Khatkar and registered and records office. Records due 4 p.m. October 17/12.
October 18/12	Mailed letter to workplace including submissions of the Complainant received to date. Asked to contact office via e-mail to confirm receipt of the documents. No records received from Employer pursuant to the Demand.
November 8/12	Pre hearing conference – No representatives of the Employer participated – waited 15 minutes and then advised Complainant that hearing would take place November 15/12 as scheduled. Due to some confusion with the teleconference numbers, mailed amended Notice of Adjudication hearing. Provided new teleconference dial in password.
November 15/12	Adjudication hearing commenced at 9:00 a.m. – No employer representative present. Ensured that both teleconference numbers were monitored. No employer representative joined the teleconference by 9:15 a.m. – hearing continued in the absence of any Employer representative.

4. Despite the significant efforts of the delegate to contact and involve Motel Bollywood and its representatives in the Complaint process, including the Hearing, Motel Bollywood and its representatives were absent at the Hearing and did not respond to the delegate's efforts.
5. I find noteworthy in the Reasons and in the Director's record that the registered letters the delegate sent containing the Notice of Complaint Hearing, as well as the Demand for Employer Records, were delivered and received successfully on September 14, 2012, at the address of Motel Bollywood's director, Mr. Khatkar, and at the business address of Motel Bollywood. However, Motel Bollywood did not respond to either. As a result, the delegate went on to make the Determination on the basis of the evidence supplied by Mr. Singh prior to and at the Hearing, and the limited information Mr. Khatkar and Mr. Gunsten provided to the delegate before the Hearing.
6. The delegate, in the absence of records from Motel Bollywood and in the absence of the latter's participation at the Hearing, found the evidence of Mr. Singh credible and relied on the same in making the Determination against Motel Bollywood. More specifically, the Determination found Motel Bollywood contravened sections 16 and 18 (regular wages), 40 (overtime wages), 46 (statutory holiday pay), 58 (annual vacation) and 63 (compensation for length of service) of the *Act*. The delegate ordered Motel Bollywood to pay Mr. Singh wages and accrued interest in the amount of \$10,313.47. The delegate also imposed six (6) administrative

penalties on Motel Bollywood in the amount of \$500.00 each for a total of \$3,000.00 for contraventions of section 16, 18, 27, 40 and 46 of the *Act*, as well as section 46 of the *Employment Standards Regulation* (the “*Regulation*”).

7. The delegate sent the Determination to Motel Bollywood by registered mail, as well as regular mail, to its business address.
8. The Determination sets out the deadline for appealing the Determination as 4:30 p.m. on January 7, 2013. Motel Bollywood sent an incomplete appeal of the Determination to the Employment Standards Tribunal (the “Tribunal”) on December 19, 2012. The Tribunal, by way of correspondence dated December 27, 2012, advised Motel Bollywood to provide its complete appeal no later than 4:30 p.m. on January 7, 2013. On January 7, 2013, the Tribunal received a copy of a completed and signed Appeal Form, but without a full copy of the Determination, detailed reasons for the appeal on a separate sheet of paper, and any supporting documents. As a result, on January 9, 2013, the Tribunal informed Motel Bollywood that it would be unable to proceed with the appeal. Subsequently, on January 24, 2013, Mr. Gunsten, on behalf of Motel Bollywood, sent a new Appeal Form with his brief written submissions, a copy of the Record of Employment of Mr. Singh issued on January 17, 2013, and 17 pages of what appears to be a record of hours worked by Mr. Singh for the period November 2011, to February 24, 2012.
9. By way of remedy, Motel Bollywood is seeking the Tribunal to refer the matter back to the Director for a further hearing or review because the delegate did not have the benefit of the documents Motel Bollywood has now produced in the appeal when the Determination was made.
10. I note that Motel Bollywood has not checked off any boxes on the Appeal Form to explain what grounds of appeal it is relying upon. However, based on the written submissions of Mr. Gunsten, on behalf of Motel Bollywood, it would appear that Motel Bollywood is relying upon the natural justice ground of appeal.
11. Section 114(1) of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) provide that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director, if it decides the appeal does not satisfy or meet certain requirements. I have decided that this appeal is an appropriate case for consideration under section 114(1) of the *Act* and Rule 22 of the *Rules*. Accordingly, I will assess the appeal based solely on the Reasons; Motel Bollywood’s written submissions presented by Mr. Gunsten; and the section 112(5) “record” before the Director when the Determination was being made. If the Tribunal is satisfied that Motel Bollywood’s appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Tribunal may invite Mr. Singh and the Director to file a reply to the question of whether to extend the deadline for Motel Bollywood to file its appeal. In such case, Motel Bollywood would be given an opportunity to make a final reply to these submissions.

## ISSUE

12. Did the Director breach the principles of natural justice in making the Determination?

## ARGUMENT

13. Mr. Gunsten, in his written submissions dated January 22, 2013, states that he was unable to attend at the Hearing “due to sickness” and for the same reason, he was unable to send the documents now adduced in Motel Bollywood’s appeal. He indicates that his “boss” was away in India and the accountant was on vacation at the time, and he had “all kind of problem” [*sic*].

14. Mr. Gunsten also submits that the Determination is one-sided as it is based only on Mr. Singh's evidence and the Director never considered the evidence of Motel Bollywood. He states that Motel Bollywood does not agree with the Determination and wants the matter reviewed again now that Motel Bollywood's documents have been produced.

## ANALYSIS

15. While Motel Bollywood has not specifically identified in the Appeal Form its grounds for appealing the Determination, as indicated previously, the written submissions of Mr. Gunsten suggest that Motel Bollywood's appeal is based on the natural justice ground of appeal in section 112(1)(b) of the *Act*. Section 112(1)(b) states:

112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

...

(b) the director failed to observe the principles of natural justice in making the determination;

16. Natural justice is an administrative law concept referring to procedural rights that ensure all parties are provided an opportunity to learn the case against them, afforded an opportunity to present their case and challenge the case of the opposing party, and the right to be heard by an independent decision-maker (See *Re: 607730 BC Ltd. c.o.b. English Inn & Resort*, BC EST # D055/05.)
17. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal further elaborated on the principles of natural justice, stating as follows:

The principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision-maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party; See *BWI Business World Incorporated*, BC EST #D050/96.

18. In this case, the onus is on Motel Bollywood to show that the Director breached the principles of natural justice in making the Determination. Having reviewed the record and the Reasons, I am sufficiently convinced that Motel Bollywood and its representatives were fully informed of the Complaint and the evidence of Ms. Singh in support of the Complaint. I am also sufficiently convinced that the delegate made a concerted effort to involve Motel Bollywood in the investigation and afforded Motel Bollywood opportunities to respond to the allegations and provide its evidence, including employer records, but to no avail as Motel Bollywood neglected to provide its records and, further, neglected to participate in the Hearing.
19. I note that Mr. Gunsten, in his submissions on behalf of Motel Bollywood, does not deny that the latter received the registered letters from the delegate containing the Notice of Complaint Hearing and the Demand for Employer Records (the "Demand"). Mr. Gunsten simply makes a bare assertion that he was sick and, therefore, unable to attend at the Hearing or produce the documents requested pursuant to the Demand. He does not explain the period he was sick and why he was unable to call the delegate or have any other representative of Motel Bollywood contact the delegate to adjourn the Hearing to another date and extend

the time to deliver Motel Bollywood's documents under the Demand to a later time before the Determination was made. I find Mr. Gunsten's submissions unpersuasive.

20. I also note that the Demand was sent to Motel Bollywood and to its director by registered mail, and it was received successfully at both the director's address as well as Motel Bollywood's business address on September 14, 2012, approximately two (2) months before the date of the Hearing. Mr. Gunsten does not explain in the appeal why Motel Bollywood was unable to gather the employer records in a timely fashion to submit to the delegate during the two-month period before the Hearing. I note he states that his "boss" was in India and the accountant on vacation but, he does not explain when and for how long they were away during this period.
21. Based on the record and the Reasons, it is evident that neither Mr. Gunsten nor his boss, Mr. Khatkar, was responsive to most contacts and requests from the delegate before the Hearing leading to the Determination. I note that in one of the very limited contacts the delegate made with Mr. Gunsten on June 28, 2012, well in advance of the Demand sent to Motel Bollywood, the delegate invited Mr. Gunsten to submit Motel Bollywood's records but Mr. Gunsten did not submit any records. I also note that Mr. Gunsten was absent at the scheduled mediation on August 1, 2012, claiming later that he was "busy and forgot". At the subsequently scheduled date for mediation on August 15, 2012, Mr. Gunsten again failed to attend and stated that his wife was in the hospital. When the delegate again rescheduled the mediation to August 17, 2012, Mr. Gunsten on that date advised that he did not have authority to settle on behalf of Motel Bollywood and he would speak with Mr. Khatkar. The mediation was subsequently scheduled to September 11, 2012, and Mr. Gunsten advised the delegate that he would ensure that Mr. Khatkar would attend. The delegate mailed mediation notices but on September 11 the mediation did not take place as Mr. Gunsten claimed he was not aware of the mediation time and refused to participate. A subsequent call on September 12 to Mr. Khatkar by the delegate went unanswered. This is indicative of Motel Bollywood and its representatives' disinterest in participating in the pre-hearing process and I find that that disinterest carried on to the Hearing.
22. I find that there is no evidentiary foundation or basis for Motel Bollywood to appeal on the natural justice ground of appeal and therefore no reasonable prospect that Motel Bollywood's appeal will be successful.
23. It is also evident that Motel Bollywood was "sitting in the weeds" during the investigation of the Complaint and during the Hearing. Once the Determination was issued against Motel Bollywood, the latter now wants to come out of the weeds and participate and have a re-hearing of the matter and produce documents that it should have produced during the investigation of the Complaint and before the Determination was made. This is not the purpose of an appeal. To allow Motel Bollywood the proverbial "second kick at the can" is inconsistent with the stated purpose of the *Act* in section 2(d), namely, "to provide fair and efficient procedures for resolving disputes over the application and interpretation of [the *Act*]".
24. I also note that Motel Bollywood's appeal is late. The Determination clearly states that "Should you wish to appeal the Determination, your appeal must be delivered to the Employment Standards Tribunal by 4:30 p.m. on January 7, 2013". Service of the Determination is not an issue in this case.
25. Whether or not an appeal is filed in a timely manner depends on whether or not the appeal is filed in accordance with Section 112(2) of the *Act*. Section 112(2) of the *Act* requires "a person who wishes to appeal a determination" to deliver to the Tribunal within the appeal period, *inter alia*, a written request specifying the grounds on which the appeal is based and a copy of the determination. As indicated previously, Motel Bollywood sent an incomplete appeal of the Determination to the Tribunal on December 19, 2012, consisting of only a completed and signed Appeal form and nothing else. The Tribunal, by way of correspondence dated December 27, 2012, advised Motel Bollywood to provide its complete appeal no later than 4:30 p.m. on

January 7, 2013. On January 7, 2013, the Tribunal received a copy of a completed and signed Appeal Form, but without a full copy of the Determination, detailed reasons for the appeal on a separate sheet of paper, and any supporting documents. As a result, on January 9, 2013, the Tribunal informed Motel Bollywood that it would be unable to proceed with the appeal. Subsequently, on January 24, 2013, Mr. Gunsten, on behalf of Motel Bollywood, sent a new Appeal Form with his brief written submissions, a copy of the Record of Employment of Mr. Singh issued on January 17, 2013, and 17 pages of what appears to be a record of hours worked by Mr. Singh for the period November 2011 to February 24, 2012.

26. It is clear that the appeal is not filed in a timely manner as the appeal was not filed in accordance with section 112(2) of the *Act* as at January 7, 2013.
27. In *Blue World It Consulting Inc.* (BC EST # D516/98), the Tribunal summarized the considerations applicable to a request for an extension of the appeal period:
- 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.
28. I find that that Motel Bollywood fails to satisfy any of these criteria. I find that this is a pattern of disregard for process and timelines Motel Bollywood has shown since the beginning of the investigation of the Complaint.

## **ORDER**

29. Pursuant to section 114(1)(b) and (f) of the *Act*, I dismiss Motel Bollywood's appeal on the grounds that it was not filed within the applicable time limit and there is no reasonable prospect that it will succeed. Accordingly, the Determination, dated November 30, 2012, is confirmed as issued.

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