

An appeal

- by -

0839907 B.C. Ltd. carrying on business as Tournament Inn & Suites
(“Tournament”)

- 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.: 2010A/005

DATE OF DECISION: March 23, 2010

DECISION

SUBMISSIONS

839907 B.C. Ltd.	on behalf of 0839907 B.C. Ltd. carrying on business as Tournament Inn & Suites
Colin D. Williams	on his own behalf
Hans Suhr	on behalf of the Director of Employment Standards

OVERVIEW

1. Collin D. Williams (“Mr. Williams”) filed a complaint (the “Complaint”) under Section 74 of the *Employment Standards Act* (the “*Act*”) with the Director of Employment Standards (the “Director”) alleging that his employer, 0839907 B.C. Ltd. carrying on business as Tournament Inn & Suites (“Tournament”) contravened the *Act* by failing to pay him commissions earned.
2. The delegate of the Director (the “Delegate”) investigated the Complaint and following his investigation issued a determination dated November 24, 2009 (the “Determination”). In the Determination, the Delegate found that Mr. Williams was an “employee” of Tournament and the latter was his “employer” within the meaning of the *Act*. The Delegate further determined that during Mr. William’s employment in May and June 2009, Tournament breached section 17 of the *Act* by failing to pay him all wages he earned at least twice per month and also breached section 18 of the *Act* when, upon termination of Mr. William’s employment, failed to pay him all wages owing within 48 hours thereafter. According to the Determination, the wages inclusive of vacation pay and interest Tournament owed to Mr. Williams totalled \$498.74.
3. The Delegate also found that Tournament breached Section 28 of the *Act* for failing to maintain payroll records pertaining to Mr. Williams.
4. In addition to ordering Tournament to pay Mr. Williams wages delineated above, the Determination also levied three administrative penalties of \$500.00 pursuant to Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in respect of each of the said breaches of the *Act* by Tournament.
5. Tournament is appealing the Determination on the sole ground that the Director failed to observe the principles of natural justice in making the Determination and is seeking the Tribunal to cancel the Determination.
6. I note that Tournament has filed its appeal of the Determination late. While the Determination, on its face, represents that the parties have until 4:30 p.m. on January 2, 2010, to file an appeal, January 2 was a Saturday and the Tribunal’s office is not open for business on Saturday or holidays. It would appear that the Director erred in representing the January 2 date as the expiry date for filing an appeal of the Determination. The date for the expiry of the appeal period should have been Monday, January 4, 2010; however, Tournament filed its appeal on January 13, 2010, approximately 9 days after the proper expiry date for the appeal. As a result, there is a preliminary issue that needs to be dealt with, namely, whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* to extend the time for Tournament to appeal. I only need to decide the merits of Tournament’s Appeal if Tournament is successful in obtaining an extension of time to file its appeal.

7. Pursuant to section 36 of the *Administrative Tribunals Act* (the “ATA”), which is incorporated in the *Act* (pursuant to section 103) and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In this case, neither party has requested an oral hearing of the appeal and in my view, both the preliminary issue and, if necessary, the appeal on the substantive issue can be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the reasons for the Determination.

ISSUES

8. 1. Should Tournament be afforded an extension of time for requesting an appeal even though the appeal period has expired?
9. 2. If the answer to first question is in the affirmative, did the Director fail to observe the principles of natural justice in making the Determination?

FACTS

10. Tournament operates a motel in Kamloops, British Columbia.
11. Mr. Williams, on August 31, 2009, filed a complaint pursuant to section 74 of the *Act* alleging that Tournament contravened the *Act* by failing to pay him wages for work he performed for Tournament during the period May 15 to June 23, 2009.
12. The Delegate opted to conduct an investigation into the Complaint but did not conduct a hearing.
13. In his investigation, the Delegate notes that Mr. Williams asserted that he moved to Tournament’s motel on May 5, 2009 and began working for Tournament on May 9, 2009 as he had a deal with Tournament to work to defray some of the cost of his rent at the motel. He apparently received some rent supplement in the order of \$375.00 each month, which did not cover the full cost of the room he rented at Tournament’s motel, which cost \$800.00 per month. While he had a roommate from May 5 to May 29 who contributed another \$375.00 towards the rent, after May 29 Mr. Williams lived by himself and only paid Tournament \$375.00 per month.
14. The Delegate further notes that Mr. Williams stated that he worked for Tournament until June 23 and he believes his wage rate was \$14.00 per hour. He was never provided any wage statement from Tournament and did not track his hours of work although he believes he would have worked at least 2 hours every day.
15. As for the nature of work he performed for Tournament, the Delegate notes that Mr. Williams claimed that he mowed the lawn, performed some pressure washing work; carried materials to the dumpster; cleaned rooms; made beds; vacuumed carpets; changed light bulbs; moved mattresses and other furniture in and out of rooms; cleaned barbeque area; emptied and cleaned hot tub; stacked and returned beverage cans; and provided security for the motel.
16. As for Tournament’s position in response to Mr. Williams’ Complaint, the Delegate notes that on September 23, 2009, he contacted by telephone Tournament’s director, Mr. Roger Dhesa (“Mr. Dhesa”), who as at that date was aware of the Complaint, having received the Self Help Kit from Mr. Williams. The nature and substance of the telephone discussion between the Delegate and Mr. Dhesa is documented in one of the two letters dated September 25, 2009, from the Delegate to Tournament sent by both regular and registered mail

to the attention of Mr. Dhesa and copied to the other directors of Tournament as well. In this letter, the Delegate states, inter alia:

My understanding of our telephone discussion of September 23, 2009, was that you advised me that Mr. Williams was not an employee but merely performing some work to compensate you for rent that he had not paid. You further stated that you told Mr. Williams he had to work to pay rent he owed you. You also stated that Mr. Williams would occasionally be told to cut grass but would not complete the work unless you got after him. You finally advised that when Mr. Williams left your premises there were significant damages to his room, which amounted to more than \$1,000.

If I have misunderstood the information you provided I would ask that you provide me, in writing, with the facts as you recall them. Accordingly, I wish to receive your response by October 14, 2009.

17. The second letter sent on September 25, 2009, by the Delegate to Tournament's Mr. Dhesa by registered mail was a Demand for Employer Records (the "Demand"), which had an identical deadline for response as the first letter, namely, October 14, 2009. The Demand required Tournament to produce "any and all payroll records relating to wages, hours of work and conditions of employment" pertaining to Mr. Williams. However, as Tournament maintained that the motel was a family business and Mr. Williams was never hired as an employee and was only performing some work to help pay for his rent, no records were kept in respect of Mr. Williams.
18. The delegate also notes in the Determination that he spoke with Tournament's witness, Mr. Mike Dhillon ("Mr. Dhillon"), who worked as Front Desk Manager at the motel. Mr. Dhillon said he lived at the motel and knew Mr. Williams. He told the Delegate that Mr. Williams cut the grass a couple of times and was paid cash for that work. He also did some pressure washing for about 2 to 3 hours for which he was paid cash. Mr. Dhillon also reported that Mr. Williams left a messy and damaged room. He further shared that Tournament's motel is a family based business and he was a part of the family that operated the business. He stated that Mr. Williams lived at the motel for about 2 ½ months and paid some rent using welfare monies. Finally, Mr. Dhillon stated that Tournament or its representative told Mr. Williams that he would have to "work the rest [of the rent] off".
19. On October 21, the Delegate sent a letter by regular mail to Mr. Dhesa and the other directors of Tournament advising them of his preliminary findings and requested a contact from Tournament whether or not Tournament agreed with the preliminary findings. If Tournament did not agree with the preliminary findings, the Delegate requested Tournament, in such case, to "submit such further evidence in writing that you wish to provide to support your position" and imposed a deadline of November 6, 2009, for the response.
20. From my review of the section 112(5) record there does not appear to have been any response from Tournament to the Delegate's preliminary findings and the Delegate, it appears, proceeded with making the Determination. On closer examination, the Determination appears to be very similar, if not wholly identical, in terms to the Delegate's preliminary findings.
21. As concerns the findings in the Determination, the Delegate, in concluding that Mr. Williams was an "employee" of Tournament, examined the statutory definition of "employee" in the *Act* and took note of the consistency in evidence between Mr. Williams, Tournament and Mr. Dhillon of the nature of work Mr. Williams performed for Tournament (which was work that was requested by Tournament and the type of work that would normally be performed by an employee) and the understanding or "deal" struck between Mr. Williams and Tournament wherein the latter or its representative told Mr. Williams that he would have to do work to help pay for his rent at the motel.

22. As concerns wages owing to Mr. Williams, the Delegate notes in the Determination that Mr. Williams was asked by Tournament to work to pay off the balance of the rent owing each month, namely, \$800 less the \$375 supplement he submitted to Tournament. The Delegate also notes that Mr. Williams lived at the motel for 2 ½ months and had a roommate during May who contributed \$375 towards rent for the said month. While neither Tournament nor Mr. Williams kept a record of hours worked by Mr. Williams and while Mr. Williams claims that he worked at least 2 hours a day and believed that his wage rate was \$14.00 per hour, there is no evidence confirming an agreement on the wage rate. In the circumstances, the Delegate opted to accept the minimum wage of \$8.00 per hour in the *Act* and appears to have concluded that Mr. Williams must have worked sufficient amount of time to pay for the deficiency in the rent for the period he lived at the motel since Tournament or its representative told him that he would have to work to pay rent and that no one stays for free.
23. The Delegate then proceeds to assess what deficiency in rent Mr. Williams would have had to make up for during his stay at the motel. The Delegate notes that in May the deficiency in rent would have been \$50.00 as Mr. Williams was assisted with an additional \$375.00 in rent from his then roommate in addition to his own \$375.00 rent supplement for a total of \$750.00. With respect to June, Mr. Williams paid \$375.00 leaving the balance of \$425.00 due, according to the Delegate. Therefore, reasons the Delegate, the total deficiency in rent for which Mr. Williams would have had to work is \$475.00 and finds that it is reasonable to conclude that Mr. Williams worked sufficient hours to make up this difference in rent.
24. It should also be noted that while Tournament claimed that it paid some monies in cash to Mr. Williams for work he did, the Delegate noted that there was no evidence confirming any cash payment and did not see any basis to offset against the monies Mr. Williams otherwise earned (although not paid) from Tournament.
25. The delegate also noted in the Determination that section 20 of the *Act* dictates the manner in which an employer is required to pay wages earned by an employee, namely, in Canadian currency, by way of cash, cheque or other similar financial instrument drawn on a bank or other financial institution but not “in kind” as was done by Tournament in Mr. William’s case.
26. In conclusion, the Delegate ordered, in the Determination, Tournament to pay Mr. Williams wages he earned in the amount of \$475.00 for work performed in May and June plus annual vacation pay on the said amount pursuant to section 58 of the *Act*, and interest pursuant to section 88 of the *Act* for a total of \$498.74.
27. In addition, as indicated, pursuant to Section 29(1) of the *Regulation*, the Delegate levied 3 administrative penalties of \$500.00 each against Tournament for the latter’s breaches of sections 17, 18 and 28 of the *Act*.
28. The Determination was made on November 24, 2009 and sent by regular and registered mail to Tournament’s business address and copies to two of its directors including Mr. Dhesa.
29. As indicated earlier, the appeal deadline is wrongly described in the Determination as January 2, 2002, a Saturday. The proper expiry date for the appeal is Monday, January 4, 2010. However, Tournament filed the appeal on January 13, 2010, 9 days after the expiry of the proper appeal expiry date.

SUBMISSIONS OF TOURNAMENT

30. With respect to the late filing of the appeal, Tournament provides two reasons. The first is that the grandmother in the family that owns Tournament “underwent [a] major heart surgery and was on the verge of life and [sic] death”.

31. The second reason Tournament provides is simply failure to read the appeal date. In particular, Tournament states “we did not read the due date for the appeal process; we thought the deadline was due in the month of January.”

32. While I must first decide the preliminary issue of whether or not to allow Tournament an extension of time to appeal and pending that determination whether or not I need to consider the merits of Tournament’s appeal, I note that in the preliminary issue I am however required to review the substantive submissions of Tournament. This is because one of the relevant 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 Tournament.

33. Having said this, I have reviewed, and very carefully I might add, the substantive submissions of Tournament in its appeal. I find that very little is devoted to the stated ground of appeal stated in the Appeal Form, namely, the “natural justice” ground of appeal. There are two sentences that appear to be devoted in a 3-page submission in the appeal to the natural justice ground. I propose to set out the two sentences verbatim below:

...Delegate of the Director was very rude to our family and did not cooperate with our company. He just listens [sic] to Collin’s side of the story.

34. The balance of the submissions of Tournament are in the nature of a re-argument of the case and a review of the character of Mr. Williams and his alleged criminal background and history. While I do not find it necessary to reiterate all those submissions here, I do want to observe that one significant part of the re-argument of Tournament in the appeal is the latter’s contention that Mr. Williams was never hired as an employee yet there is an acknowledgement by Tournament in the appeal submissions that he did work for Tournament. More specifically, Tournament states:

[Mr. Williams] was never an employee [sic] he just completed odd jobs to secure his shelter. He totally understood our Rule and regulations. He is doing a false claim against our company.

Collin Williams is completely wrong [sic] he was never hired, was never an employee, no wages were EVER negotiated. He did complete tasks around the property to pay off his rent balance and he was totally aware of what was going on. There were no grey areas. There was an agreement to live and do chores and no money was supposed to be paid to him directly. These criminals are using the government services to commit their crimes, and it [sic] working because the Employment Standards are [sic] listening to everything he says.

SUBMISSIONS OF MR. WILLIAMS

35. I have reviewed the submissions of Mr. Williams and note that there is not very much in his submissions addressing the preliminary issue of the late appeal I am required to decide first. The only submission of Mr. Williams that arguably could be construed as relating to the preliminary issue is the following containing a racist overtone and I have decided to delineate it verbatim:

A 39 day period that the appeal was not sent in is some what troubling me cause I know “Indian” people and if there is a 2000\$ bill out there it’s gonna get tended to [sic].

36. The balance of Mr. Williams’ submissions appear to be a re-argument of his case and reiterate much of what he submitted to the Delegate in the investigation of the Complaint and I do not find it necessary to review it here.

37. I also note that in his submissions, Mr. Williams, while sharing his own release from jail, imputes bad character to Mr. Dhesa and calls him a “law breaker” and gratuitously makes certain generalizations with racist overtones against “East Indians”. He states

...I was working for east indians and they are always trying to trick someone out of wage. But I know how to get the money from these tricksters, and this is my second time doing so. Such shenanigans need to be taken back to india [sic].

SUBMISSIONS OF THE DIRECTOR

38. In response to the appeal, the Director, on the preliminary issue, submits that the Tribunal should not exercise its jurisdiction to extend the time for appeal and deny Tournament’s appeal. In support of this submission, the Director notes several factors. First, the Director states that Tournament does not identify the date of the grandmother’s surgery and its own admission that there was a failure on Tournament’s part to read the “due date for the appeal process” is not a “good reason” for extending the appeal.
39. Second, the Director states that while there was an error in the Determination identifying the appeal expiry date as January 2 when it should have been January 4, Tournament “still filed the appeal some 9 calendar days after the corrected date of January 4”.
40. Third, the Director states that Tournament never expressed its intention to appeal the Determination (presumably before the appeal expiry date).
41. Fourth, the Director states that neither the Delegate who wrote the Determination nor the Complainant was aware of Tournament’s intent to appeal.
42. Fifth, while the Director notes that Tournament does not address the matter of whether extending the deadline for Tournament to appeal the Determination harms (or not) Mr. William’s case, the Director admits that there is likely no harm arising from granting the extension except delay in Mr. Williams receiving his wages.
43. Lastly, the Director submits that Tournament does not have a strong case that might succeed if the Tribunal grants an extension to appeal. In particular, the Director notes that Tournament has provided in the appeal its “version of the circumstances” and commented on the personal character of [Mr. Williams]” but overlooked the issues raised in the Determination.
44. As concerns the natural justice ground of appeal, the Director notes that Tournament is making a false accusation against the Delegate when alleging rude conduct and lack of cooperation on the Delegate’s part in his dealings with Mr. Dhesa or his family. The Director further states that Tournament has failed to provide any “specifics of how the Director or the Director’s Delegate is alleged to have failed to observe the principles of natural justice” beyond the assertion of rude conduct and lack of cooperation.

ANALYSIS

45. 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. Subsection 112(3)(a) and (b) provide:

- 112(3) The appeal period referred to in subsection (2) is:
- (a) 30 days after the date of service of the determination if the person was served by registered mail, and
 - (b) 21 days after the date of service of the determination, if the person was personally served or served under Section 122(3).

46. Section 122 of the *Act* provides:

- 122** (1) A determination ... that is required to be served on a person under this Act is deemed to have been served if
- (a) served on the person, or
 - (b) sent by registered mail to the person's last known address.
- (2) If service is by registered mail, the determination ... is deemed to be served 8 days after the determination or demand or the notice under section 30.1 (2) is deposited in a Canada Post Office.

47. Section 109(1)(b) of the *Act* sets out the Tribunal's authority to extend the time period for requesting an Appeal under Section 112, and provides:

109(1) In addition to its powers under Section 108 and Part 13, the tribunal may do one or more of the following:

...

- (b) extend the time period for requesting an appeal even though the period has expired;

48. The Tribunal will exercise its statutory discretion to extend the time for filing an appeal only where there are compelling reasons, and the burden is on the appellant to show that such reasons exist. As indicated by the Tribunal in *Re: Tang*, BC EST # D211/96.

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 extensions 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.

49. What are the factors that the Tribunal should consider in determining whether compelling reasons exist for extending the time for filing an appeal? In *Re: Dennill (c.o.b. Fibremaster Restorations & Carpet)*, BC EST # D080/01, the Tribunal delineated the following criteria which the appellant should satisfy in seeking an extension:

1. There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
2. There was a genuine and ongoing *bona fide* intention to appeal the Determination;
3. The respondent party as well as the Director was aware of this intention;

4. The respondent party will not be unduly prejudiced by the granting of the extension;
5. There is a strong *prima facie* case in favour of the appellant.

50. Having reviewed the submissions of all of the parties in the Appeal, I am not satisfied that an extension ought to be granted to Tournament to file its Appeal late.
51. First, I am not persuaded that Tournament has offered a reasonable and credible explanation for the failure to request an Appeal within the statutory time limits. The Determination was sent by registered mail to Tournament at its business address in Kamloops in accordance with Section 122(1) of the *Act*. The Determination was also sent by registered mail to Tournament at its registered and records office and by regular mail to all three of its directors at the same address in Surrey at 12895-64A Avenue.
52. The section 112(5) record adduced by the Director in this appeal contains delivery records of Canada Post evidencing that the registered mail delivery to Tournament in Surrey was signed received by someone called “Bill” on November 25, 2009, and in Kamloops by “J. Dhessa” on November 26, 2009. In any event, Tournament does not dispute receiving the Determination and appealing the same late on January 13, 2010, about 9 days after the expiry of the time to appeal.
53. In their submissions, the directors of Tournament provide two reasons for the late filing of the appeal. First, that their grandmother underwent a major surgery at the Surrey Memorial Hospital and her life was at risk. They say that their whole family was in Surrey as a result. However, they do not indicate when she underwent the surgery and if the timing of the surgery delayed their appeal although that may be the undertone in the submissions. In such case, I note that a copy of the Determination was also sent to the Surrey address of the registered and records office of Tournament (in addition to the Kamloops business address for Tournament) and also to each of the directors at the same Surrey address.
54. What is equally, if not more, disconcerting to me than not receiving any corroborating evidence and particularly any indication of the date or time frame of their grandmother’s surgery which took them away to Surrey is the directors’ admission that they “did not read the due date for the appeal process” although they admit that they “thought the deadline” for the appeal was in January. The Determination was sent to all three directors by mail and I find it curious that if they all “did not read the due date for the appeal process”.
55. I find that with respect to the first criteria for granting an extension of time, Tournament has failed to discharge the onus on it to show that there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits.
56. Second, there is no evidence whatsoever in Tournament’s submissions showing a genuine and ongoing bona fide intention on the part of Tournament to appeal the Determination. Neither Mr. Dhessa nor the other directors of Tournament telephoned the Delegate or anyone else at the Branch after the Determination was issued to advise of Tournament’s intention to appeal or that Tournament required more time to file an appeal because of the grandmother’s surgery whenever that surgery was scheduled.
57. Third, there is no indication that Tournament made any attempts to inform the Director or Mr. Williams of Tournament’s intention to appeal the Determination at any time.
58. Fourth, one of the essential purposes of the *Act* is to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act* (section 2(d)). While I note that the delay in Tournament’s filing of its appeal is not inordinate and that the Director admits that “there is not likely to be any harm to the Respondent’s case arising from extending the appeal deadline other than not receiving wages

determined to be owing”, this is but only one of several factors and not the sole determinative factor in my decision on the preliminary issue.

59. Lastly, having reviewed the substantive submissions of Tournament on the merits of its appeal, I am not persuaded that there is a strong *prima facie* case in Tournament’s favour. In my view, Tournament’s appeal appears to be a re-argument of its case and a challenge to the Director’s findings of fact with a view to obtaining a more favourable decision. This is not an appropriate basis to appeal the Determination. The statutory grounds for appealing the Determination are limited to three in section 112(1) of the *Act*, namely, “error of law”, “natural justice” and “new evidence”. A challenge to the findings of fact of the Delegate is not a ground of appeal. Moreover, it is noteworthy that the very facts the Delegate relied upon in his investigation to conclude that Mr. Williams performed “work” and was an “employee” within the meaning of the *Act* are repeated and admitted by Tournament again in its appeal submissions. In my view, the Delegate properly interpreted the *Act* and the evidence adduced by the parties during the investigation of the Complaint reasonably supports the Delegate’s findings of facts.
60. I also note with respect to the “natural justice” ground of appeal of Tournament, the allegations of Tournament that the Delegate behaved rudely towards the Dhesa family and “did not cooperate with [Tournament]” and only listened to Mr. Williams’ “side of the story” lack specificity and appear to be no more than bare allegations. It is important for appellants to know, and in this case Tournament and its directors involved in the appeal of the Determination, that impugning or assailing the character of a delegate and challenging his integrity in the adjudication process, whether that process takes the form of an investigation of a complaint or a full blown hearing leading to a determination, is a serious matter and should not be taken lightly. Appellants should be very circumspect about levelling allegations challenging the integrity and character of a delegate when they do not have any evidence or any factual basis to support such challenge.
61. Having reviewed the facts in this case in context of the criteria in *Re Dennill, supra*, for exercising my discretion to grant an extension of time pursuant to section 109(1) (b), I am not satisfied, on the balance, that this is a case where I should exercise that discretion. I, therefore, deny Tournament an extension of time to file its appeal.

ORDER

62. Pursuant to Section 114(1)(b) of the *Act*, Tournament’s Appeal is dismissed on the basis that a request for an Appeal has not been made within the time permitted.
63. Further, pursuant to Section 115 of the *Act*, the Determination is confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal