

An appeal

- by -

Jannat Sleep Centre Ltd. carrying on business as Sleep Centre
(“Jannat”)

- 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: David B. Stevenson

FILE No.: 2010A/178

DATE OF DECISION: March 25, 2011

DECISION

SUBMISSIONS

Hargurchet Singh	on behalf of Jannat Sleep Centre Ltd.
Meenu Panesar	on her own behalf
Joy Archer	on behalf of the Director

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Jannat Sleep Centre Ltd. carrying on business as Sleep Centre (“Jannat”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 9, 2010.
2. The Determination was made by the Director on a complaint filed by Meenu Panesar (“Panesar”), who alleged Jannat had contravened the *Act* by failing to pay regular wages, overtime wages, statutory holiday pay, annual vacation pay and length of service compensation. The Determination found that Jannat had contravened Part 3, sections 17 and 18, Part 4, section 40, Part 5, section 46, Part 7, section 58 and Part 8, section 63 of the *Act* and ordered Jannat to pay Panesar \$4,739.28, an amount which included wages and interest.
3. The Director also imposed administrative penalties on Jannat under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$2,000.00.
4. The total amount of the Determination is \$6,739.28.
5. Jannat has appealed the Determination on the grounds evidence has come available that was not available at the time the Determination was being made. The appeal was incomplete when it was filed and Jannat was granted a period of time to comply with the filing requirements set out in section 112(2) of the *Act*. As a result, the appeal was filed late. Jannat has requested the time period for filing the appeal be extended.
6. The Tribunal has a discretion whether to hold an oral hearing on an appeal, but has decided an oral hearing is not necessary in this case. The issues involved in this appeal can be decided from the submissions and the material on the section 112(5) Record.

ISSUE

7. There is an initial issue about whether the Tribunal should extend the appeal period. If the Tribunal decides to extend the appeal period, the issue raised in the appeal is whether evidence has come available that was not available at the time the Determination was being made and, if so, whether that evidence would affect the correctness of the Determination.

THE FACTS

8. The facts relating to the timeliness issue are as follows:

1. The Determination was issued on November 9, 2010.
2. The Determination was issued without reasons.
3. The Determination indicated that Jannat had seven days from service of a copy of the Determination to make a request for written reasons.
4. The Determination provided appeal information and indicated any appeal was required to be delivered to the Tribunal “by 4:30 pm on December 17, 2010”
5. Jannat filed an incomplete appeal with the Tribunal on December 17, 2010.
6. The filing did not comply with the requirements of section 112(2), as it did not include a copy of the Director’s written reasons for the Determination.
7. The submission which accompanied the filing indicated efforts had been made to obtain written reasons and included a request for an extension of time to obtain the written reasons.
8. Jannat made the request in writing for written reasons for the Determination on December 13, 2010.
9. The Tribunal allowed Jannat an extension of time, to January 21, 2011, to obtain written reasons and perfect the appeal.
10. The Director’s written reasons were provided on January 20, 2011 and filed by Jannat with the Tribunal on January 21, 2011.
11. The requirements for filing an appeal were met on January 21, 2011 and the Tribunal has applied that date as the date of filing.

ARGUMENT

9. Jannat says it tried to get written reasons from the Director before it made the December 17, 2010 filing to the Tribunal. Jannat refers to telephone calls and a fax request made to the Director before the December 17 date.
10. The Director says Jannat took too long to request written reasons from the Director and has provided no explanation for the delay in making that request. The Director says Jannat made no inquiry about obtaining written reasons for two weeks after the Determination was issued and made no actual request for written reasons until December 13, 2010. The Director says there is no other good reason for extending the appeal period.

THE ANALYSIS

11. The *Act* imposes an appeal deadline to ensure appeals are dealt with promptly: section 2(d). The *Act* allows the appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend time limits for filing an appeal:

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.

12. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST # D099/96. The following criteria should be satisfied to grant an extension:
 1. There is a reasonable and credible explanation for failing to request an appeal within the statutory limit;
 2. There has been a genuine and ongoing *bona fide* intention to appeal the Determination;
 3. The respondent party and the Director have been made aware of the intention;
 4. The respondent party will not be unduly prejudiced by the granting of an extension;
 5. There is a strong *prima facie* case in favour of the appellant.
13. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can also be considered. The burden of demonstrating the existence of any such criterion is on the party requesting the extension of time. No unique criteria are indicated in this case.
14. In respect of the first criterion, I find that while Jannat may not have been particularly attentive to acquiring written reasons for the Determination from the Director, the request for written reasons was made within the appeal period. After the request, the ball, so to speak, was in the Director's court. The Director had four days to provide written reasons within the appeal period; those reasons were not provided until January 20, 2011.
15. The material indicates Jannat had a genuine and ongoing *bona fide* intention to appeal the Determination. As the Director concedes in their submission on the timeliness issue, it was reasonable to assume Jannat might appeal the Determination when it enquired about the process for obtaining written reasons on November 30, 2010.
16. I do not find, in the particular circumstances of this case, that there will not be any additional prejudice to Panesar by extending the time for filing the appeal. Panesar was aware of Jannat's intention to appeal when she was notified of the December 17, 2010 filing. In this respect, the Director is incorrect in stating the initial filing was made on December 21, 2010. Had Jannat included the written reasons for the Determination, the appeal would have been made within the period allowed in the *Act*.
17. I agree with the Director that Jannat does not have a strong case on appeal, but this factor is only one of five the Tribunal normally considers on timeliness issues. It is not in itself determinative or even predominant of the other factors. All the applicable factors are considered together and a judgement is made by the Tribunal.
18. In this case, weighing all the factors in the circumstances and in the context of the objects and purposes of the *Act*, I exercise my discretion under section 109(1)(b) of the *Act* and extend the period for filing the appeal to January 21, 2011.
19. That does not, however, end the matter. Under section 114 of the *Act*, the Tribunal may dismiss all or part of an appeal for a number of reasons listed in that section, including finding the appeal has no reasonable prospect of success: see 114(1)(f). After having reviewed the appeal and the arguments made in support of it, I make that finding here. I do so for three reasons.
20. First, the appeal is grounded solely in new evidence becoming available that was not available when the Determination was being made. The evidence referred to is not submitted with the appeal, but is described

as evidence that Panesar bought, but never paid for, some furniture while she was working for Jannat. Such evidence and information would not be new. It was a fact that must have been known to Jannat during the complaint process. There can be no acceptable reason why such evidence was not provided to the Director during the complaint process and prior to the Determination being made. The Tribunal's approach to alleged "new" evidence raised in an appeal has been described in the Tribunal decisions *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03 and *Senor Rana's Cantina Ltd.*, BC EST # D017/05. Briefly, the Tribunal has consistently taken a relatively strict approach to what will be accepted. The Tribunal considers whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination. Based on what has been provided, this purported "new evidence" would not be accepted in Jannat's appeal. That conclusion effectively eliminates the statutory foundation for the appeal.

21. Second, Jannat did not appear at the complaint hearing or make any other attempt to provide this alleged "new evidence" to the Director before the Determination was made. The attempt to introduce this evidence into the appeal flies directly in the face of a long standing approach to attempts by appellants to introduce evidence in an appeal that could reasonably have been provided to the Director during the complaint process but was not: see *Tri-West Tractors Ltd.*, BC EST # D268/96; and *Kaiser Stables Ltd.*, BC EST # D058/97.
22. Third, even if I viewed the appeal from a broader perspective than the chosen "new evidence" ground, the argument implicit in the appeal, that Panesar owes Jannat money for furniture that should (based on an alleged verbal understanding) be deducted from her wages, is a result that is prohibited by section 21 of the *Act*, which states, in part:

21(1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold deduct or require payment of all or part of an employee's wages for any purpose.

23. Based on that prohibition, the Director could not have done what Jannat appears to seek in the appeal and the Determination could not be changed for that reason.
24. For the above reasons, the appeal has no reasonable prospect of success and is dismissed on that basis.

ORDER

25. Pursuant to section 114 of the *Act*, I order the appeal dismissed and the November 9, 2010 Determination confirmed in the amount of \$6,739.28 together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal