

An appeal

- by -

Navdeep Brar
(“Ms. Brar”)

- 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: David B. Stevenson

FILE No.: 2012A/17

DATE OF DECISION: May 8, 2012

DECISION

SUBMISSIONS

Navdeep Brar	on her own behalf
Kuldip Grewal	on behalf of GMG Food Enterprises Ltd. carrying on business as Chimney Hill Pizza & Curry
Emily K. Yao	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Navdeep Brar (“Ms. Brar”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 30, 2012.
2. The Determination found that Ms. Brar’s former employer, GMG Food Enterprises Ltd. carrying on business as Chimney Hill Pizza & Curry (“GMG Food”), had contravened provisions of the *Act* in respect of her employment and ordered GMG Food to pay wages to Ms. Brar in the amount of \$423.68 and to pay administrative penalties in the amount of \$1,000.00.
3. Ms. Brar has filed an appeal of the Determination, indicating new evidence has come available that was not available at the time the Determination was made.
4. While it is not specifically expressed in the appeal, the submissions made by Ms. Brar suggest she is seeking a form of hearing on the appeal where the Tribunal might contact witnesses and review evidence. The Tribunal has discretion, under section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*, to choose the type of hearing for deciding an appeal and has decided the matters raised in this appeal can be decided from the written submissions.
5. The appeal was filed late, and Ms. Brar has requested the Tribunal extend the time period for filing an appeal. On March 9, 2012, the Tribunal notified the parties that the timeliness issue would be decided before the parties were asked to respond on the merits of the appeal. This decision addresses this application to extend the time period for filing an appeal under the *Act*.

ISSUE

6. The issue is whether the Tribunal should extend the appeal period.

THE FACTS

7. The facts relating to the issue of timeliness are as follows:
 1. The Determination was issued on January 30, 2012;
 2. The time limited for filing an appeal under the *Act* expired on February 20, 2012;
 3. On February 21, 2012, the Tribunal received an incomplete appeal from Ms. Brar;

4. On February 21, 2012, the Tribunal contacted Ms. Brar requesting that she provide the material necessary to complete the appeal;
5. The Tribunal was advised that Ms. Brar would provide the material required to complete the appeal on February 22, 2012;
6. The material was not provided on that day;
7. Another assurance was given on behalf of Ms. Brar to provide the material by February 24, 2012;
8. As of February 27, 2012, the Tribunal had not been provided with the requested material and communicated on that date with Ms. Brar advising her that the appeal was late, that Ms. Brar would need to file a request to extend the appeal period and the Tribunal would consider that request;
9. By March 1, 2012, the Tribunal had received nothing from Ms. Brar and notified her that the appeal would not proceed without the requested material and that the file had been closed.
10. The requested material was delivered to the Tribunal on March 9, 2012;
11. While the ground of appeal chosen by Ms. Brar is evidence coming available that was not available at the time the Determination was made, no such evidence was provided with the appeal material.

ARGUMENT

8. Ms. Brar has provided no argument on her request to extend the appeal period. The only reference in any submission filed with the Tribunal addressing the late appeal is a cryptic comment contained in a late submission filed on April 23, 2012 – more than three weeks after the submission deadline set by the Tribunal – stating, “I would like to request the jury to accept the late reply, this fax was sent earlier from a truck stop”.

ANALYSIS

9. 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.

10. 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; and

5. There is a strong *prima facie* case in favour of the appellant.
11. 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. The Tribunal has required “compelling reasons”: *Re Wright*, BC EST # D132/97.
12. Although the initial attempt at filing an appeal of the Determination was made on February 21, 2012, one day after the appeal period, Ms. Brar failed to comply with the statutory requirements for filing an appeal set out in section 112(2) of the *Act* for another eighteen days despite verbal and written requests by the Tribunal. Ms. Brar has provided no explanation for failing to file an appeal of the Determination within the statutory appeal period. The continuing delay in perfecting the appeal is somehow attributed to the April 23, 2012, communication being sent by fax from a truck stop.
13. Applying the relevant criteria outlined, I find the delay, while not overly lengthy, is entirely unexplained; there is no indication of an ongoing intention to appeal the Determination. An assessment of the *prima facie* case criterion does not require a conclusion that the appeal will fail or succeed, but it does require consideration of the relative strength of the grounds for appeal chosen against long standing principles that apply in the context of those grounds. Such an assessment flows from the need for fair treatment of the parties and fair and efficient dispute resolution procedures. Simply put, it is neither fair nor efficient to put parties through the delay and expense of an appeal process where the appeal is likely to fail.
14. In this case, those principles would require Ms. Brar to show such evidence was not reasonably available and could not have been provided during the complaint process, that the evidence is relevant to a material issue arising from the complaint, that it is credible, in the sense that it be reasonably capable of belief, and that it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03.
15. It is apparent the appeal contains no new evidence. All of the evidence referred to in the appeal was either provided to the Director or was presented during the complaint hearing, but not accepted by the Director. In either case, the evidence is not “new” and unlikely to be allowed in the appeal. I can see no likelihood the appeal can succeed on this ground.
16. For the above reasons, the request to extend the appeal period is denied. The appeal is dismissed.

ORDER

17. Pursuant to Section 115 of the *Act*, I order the Determination dated January 30, 2012, be confirmed in the total amount of \$1,423.68, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal