

An appeal

- by -

Globe-Time Travel Ltd.  
("Globe")

- 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.:** 2011A/45

**DATE OF DECISION:** June 14, 2011

## DECISION

### SUBMISSIONS

Davinder Gill	on behalf of Globe-Time Travel Ltd.
Gagan Dhaliwal	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by the employer, Globe-Time Travel Ltd. (“Globe”), pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), of a Determination issued by the Director of Employment Standards (the “Director”) on February 21, 2011.
2. The Determination found that Globe had contravened the *Act* in respect of the employment of the complainant, Mr. Yongquiang Leo Hu (“Mr. Hu”), and owed him \$2,658.07. The amount included sums for wages (s. 18 of the *Act*), overtime (s. 40 of the *Act*), statutory holiday pay (s. 45 of the *Act*), annual vacation pay (s. 58 of the *Act*) and \$41.71 in interest in accordance with section 88 of the *Act*.
3. The Determination also imposed on Globe three administrative penalties of \$500 each, pursuant to section 29 of the *Employment Standards Regulation* (the “*Regulation*”) for contraventions of sections 18 and 45 of the *Act*, as well as section 46 of the *Regulation* which governs production of payroll records.
4. Globe, through one of its four Directors, Davinder Gill (“Ms. Gill”), appealed the Determination on the natural justice ground of appeal in section 112(1)(b) of the *Act*, arguing that the Director failed to observe the principles of natural justice in making the Determination.
5. As a remedy, Globe is seeking a cancellation of the Determination.
6. Prior to considering the parties’ submissions on Globe’s substantive ground of appeal, there is a preliminary issue of the timeliness of the appeal. More specifically, as previously indicated, the Determination was made on February 21, 2011, and the appeal was filed on April 15, 2011, approximately two weeks after the expiry of the appeal period in section 112(3)(a) of the *Act*.
7. Section 109(1)(b) of the *Act* affords the Tribunal the discretion to extend the deadline for requesting an appeal even though the appeal period has expired. Therefore, the Tribunal, in this decision, will first consider the issue of whether it should exercise its discretion and extend the deadline for Globe to appeal even though the period for seeking an appeal has expired. If the Tribunal grants an extension of time to appeal to Globe, then the Tribunal will afford the parties a full opportunity to respond to the merits of the appeal, although Globe appears to have made submissions on the merits in its appeal and the Director has limited its submissions to addressing the matter of the late appeal.
8. Pursuant to section 36 of the *Administrative Tribunal’s Act* (the “ATA”), which is incorporated into the *Act* (s. 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 my view, the preliminary issue in this appeal can be adjudicated on the basis of the section 112(5) “record” and the written submissions of the parties, as well as the Reasons for the Determination to the extent they are of any assistance.

## ISSUE

9. Should the Tribunal exercise its discretion under section 109(1)(b) of the *Act* and allow the appeal even though the period for seeking an appeal has expired?

## THE FACTS AND ANALYSIS

10. As indicated previously, the Determination was issued on February 21, 2011. The Determination was sent to Globe's business office address by registered mail on the same date and it was also sent to the registered and records of Globe, as well as to the home addresses of all four Directors of Globe, including Ms. Gill.
11. The Determination, on the second page, indicates in no uncertain terms that any party wishing to appeal the Determination must do so by delivering its appeal to the Tribunal by "4:30 p.m. on March 31, 2011". There is also a telephone number provided for the Tribunal in the area setting out the appeal deadline.
12. I note that Globe or Ms. Gill does not dispute receiving the Determination in a timely fashion. Instead, Ms. Gill explains Globe's or her reason for not appealing the Determination within the time permitted as follows:

I could not appeal before 31 Mar. '11 as I am home trying to recover from a recent car accident. It has demoralized me, made me physically incapable for going to public places. I am in pain, was wearing leg brace for my knee injury and am still wearing my halo brace.
13. In her substantive submissions, I note that Ms. Gill makes reference to her accident occurring on January 27, 2011. She also indicates that she was at the hospital for a period of one week as a result of the accident and ever since she has been trying to recover. She mentions that she sees her doctor and a physiotherapist but she "could not respond to letters and mail after the hearing". She provides in her written submissions an email address and her cell phone number where she can be contacted for any questions.
14. In her late filed final reply, Ms. Gill further explains her knee or leg injury and states now that she was in the hospital for a total of 11 days, 3 days in emergency and 8 days out of emergency before she was discharged. The balance of the final reply is not a proper reply to anything raised in the response of the Director to the appeal, and, for the most part, consists of a combination of re-argument of her position why Mr. Hu was not hired by Globe as an employee and taking offence to Mr. Hu's claim and the Director's questioning of the delay in filing of Globe's appeal.
15. The Director, in her very brief submissions, states that Globe's late appeal should not be accepted as Ms. Gill has not explained "when her accident took place nor does she provide any evidence of it".
16. I note that Mr. Hu's submissions are absent in the appeal, despite the Tribunal's correspondence to Mr. Hu and attempts to contact him with respect to Globe's appeal.
17. Having set out the submissions of both Globe and the Director on the late appeal of Globe, as indicated previously, section 109(1)(b) provides the Tribunal the discretion to extend the time for requesting an appeal even though the time to appeal has expired. However, the onus in such case is on the party seeking an extension of time to appeal to show that there exist compelling reasons for the Tribunal to exercise its discretion to grant an extension of the appeal period.

18. In *Blue World IT Consulting Inc.*, BC EST # D516/98, the Tribunal set out the following non-exhaustive factors it may consider in deciding whether to grant an extension of the appeal:
- 1) There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
  - 2) There has been a genuine and on-going *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.
19. Having reviewed the above considerations in context of the facts in this case, and for the reasons set out below, I find that Globe, or Ms. Gill on its behalf, has failed to satisfy the criteria for granting an extension of time to file an appeal.
20. First, I note that while Ms. Gill claims that she was incapacitated for at least one week during her hospital stay after her accident of January 27, 2011, Ms. Gill does not explain why none of the other Directors, who were served with the Determination, chose to file an appeal on behalf of Globe in a timely fashion. She also does not explain or satisfactorily explain how her alleged motor vehicle accident injury incapacitated her, after her 1-week (or according to her subsequent late filed reply, an 11 day) stay at the hospital, from filing an appeal in a timely fashion. There is also no indication of what, if any, efforts she made or discussions she had with any of the other Directors to have them file Globe's appeal in a timely fashion. She also does not explain why she did not contact the Tribunal at any time after she was released from the hospital, and before the appeal period expired, to advise the Tribunal that she required an extension of time, assuming she was the only one, for whatever reason, who could file an appeal on behalf of Globe.
21. Second, there is no evidence of a genuine and on-going *bona fide* intention on the part of Ms. Gill or Globe to appeal the Determination during the appeal period. On the basis of the evidence provided by Ms. Gill, she would have been out of the hospital by either February 4 or February 8 (depending on the accuracy of her original appeal submissions or her late final reply). She had ample time, before March 31, to at least make a telephone call to the Tribunal (whose telephone number is provided in the Determination within very close proximity to the date set out for appeal) to advise the Tribunal she required some more time to file an appeal on behalf of Globe. However, neither Ms. Gill, nor any of the other Directors of Globe, showed any intention to appeal the Determination.
22. Third, neither Ms. Gill or nor any one of the other Directors of Globe made Mr. Hu and the Director aware of Globe's intention to appeal.
23. Fourth, while, arguably, there may be no, or very little, undue prejudice to Mr. Hu in granting Globe an extension of time to appeal, I am mindful of the need for a timely disposition of an appeal and the stated purpose in section 2(c) of the *Act* "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*". I do not think that a finding of no prejudice to Mr. Hu really assists him on the balance when all relevant factors, and particularly the final factor set out in *Blue World IT Consulting Inc.*, *supra*, for granting an extension of time for appealing the Determination is considered below.
24. With respect to the final consideration in *Blue World IT Consulting Inc.*, I note that the merits of Globe's appeal are not a relevant consideration for the Tribunal in deciding whether to extend the appeal period except to the extent necessary to determine if there is a "strong *prima facie* case that might succeed" (Re *Owolabi c.o.b. Just*

*Beauty*, BC EST # D193/04; Re *BNN Enterprises Ltd.*, BC EST # D165/04). Although I have not, in this case, set out the substantive arguments of Ms. Gill or Globe, I have reviewed the substantive submissions and I find that Ms. Gill has not set out any basis whatsoever for the natural justice ground of appeal she has based Globe's appeal on. What she has done, however, is essentially re-argue and re-assert Globe's position at the hearing of Mr. Hu's complaint. More particularly, she reargues that Mr. Hu was not an employee of Globe, but a mere volunteer who was receiving training so that eventually he could find employment in a Chinese-speaking office or travel agency. This argument was not only considered, but also rejected, by the Director based on all the evidence at the Hearing. Even if I were inclined to grant an extension of time to Globe to appeal (which I am not), I am not persuaded that there is any basis under section 112(1) of the *Act* to change or cancel the Determination. Effectively, Ms. Gill is challenging, in Globe's appeal, the Delegate's findings or conclusions of fact in the Determination with a view to getting a second more favourable hearing and outcome on appeal. Appeal is not a forum for dis-satisfied parties to have a "second kick at the can" as it were.

25. Globe's request for an extension of the deadline for appeal and for the acceptance of the appeal is denied, and Globe's appeal is dismissed pursuant to section 114(1) of the *Act*.

## **ORDER**

26. Pursuant to section 115(1) of the *Act*, the Determination dated February 21, 2011 is confirmed, along with any additional interest calculated in accordance with section 88 of the *Act*.

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