

An appeal

- by -

Sutherland Hills Rest Home Ltd.  
(“Sutherland Hills”)

- 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/47

**DATE OF DECISION:** June 15, 2011

## DECISION

### SUBMISSIONS

Veronica Ukrainetz	counsel for Sutherland Hills Rest Home Ltd.
Christopher J. Butler	counsel for Celeste Fabris
Joe LeBlanc	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by the employer, Sutherland Hills Rest Home Ltd. (“Sutherland Hills”), pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), of a Determination issued by the Director of Employment Standards (the “Director”) on March 9, 2011.
2. Ms. Celeste Fabris (“Ms. Fabris”) was employed at Sutherland Hills, a residential care home facility, in Kelowna as a Registered Nurse from June 23, 2002, to June 30, 2010.
3. On October 14, 2010, Ms. Fabris filed a complaint under section 74 of the *Act* alleging that Sutherland Hills contravened the *Act* by terminating her employment without payment of compensation for length of service (the “Complaint”).
4. Subsequently, on November 30, 2010, both Sutherland Hills and Ms. Fabris participated in a mediation session, which, unfortunately, did not bring the parties a resolution.
5. Subsequently, on January 25, 2011, the delegate of the Director (the “Delegate”) held a hearing of the Complaint (the “Hearing”) and on March 9, 2011, issued his determination (the “Determination”).
6. The Determination found that Sutherland Hills had contravened the *Act* in respect of the employment of Ms. Fabris and owed her \$11,345.74. The amount included sums for compensation for length of service (s. 63(2)(b) of the *Act*), annual vacation pay (s. 58 of the *Act*), and \$215.74 in interest in accordance with section 88 of the *Act*.
7. The Determination also imposed on Sutherland Hills an administrative penalty of \$500, pursuant to section 29 of the *Employment Standards Regulation* (the “*Regulation*”), for contravention of section 63 of the *Act*.
8. Sutherland Hills appeals the Determination and in its Appeal Form identifies, in paragraph 2, two (2) grounds of appeal; namely, the error of law ground of appeal (s. 112(1)(a) of the *Act*) and the natural justice ground of appeal (s. 112(1)(b) of the *Act*). However, in its counsel’s written submissions on appeal, it appears that Sutherland Hills’ appeal is based primarily, if not exclusively, on the error of law ground of appeal.
9. By way of remedy, Sutherland Hills, in its Appeal Form, is seeking a cancellation of the Determination and, possibly as an alternative, a referral back of the Determination. However, in its accompanying submissions, Sutherland Hills appears to have abandoned the second, alternative, remedy and states that it is not appropriate for the matter to be referred back to the Director.

10. Before the Tribunal can consider the parties' submissions on Sutherland Hills' substantive grounds of appeal, there is a preliminary issue of the timeliness of the appeal. More specifically, the Determination, as previously indicated, was made on March 9, 2011. The parties had until 4:30 p.m. on April 18, 2011, to file an appeal, as specified on the second page of the Determination. However, the Tribunal received the submissions portion of Sutherland Hill's appeal at 4:31 p.m. on April 18, 2011, and the attachments referred to in the appeal submissions were received separately by the Tribunal, at about 4:59 p.m., on the same day. Ms. Fabris takes issue with the slightly late late-filed appeal, and the Director does not express any position on the matter.
11. Section 109(1)(b) of the *Act* affords the Tribunal the discretion to extend the deadline for requesting an appeal when the appeal period has expired. I will, in this decision, only consider the matter of whether the Tribunal should exercise its discretion and extend the deadline for Sutherland Hills to appeal and, if my decision is in the affirmative, then the parties will be invited to make full submissions on the substantive issues raised in the appeal (although I note that all of the parties have made some significant submissions on the substantive issues and those submissions may turn out to be full and complete submissions).
12. 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 may 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.

## ISSUE

13. Should the Tribunal exercise its discretion under section 109(1)(b) of the *Act* and allow the slightly late-filed appeal?

## SUBMISSIONS OF SUTHERLAND HILLS

14. In its initial submissions in the Appeal, counsel for Sutherland Hills encloses a letter dated April 19, 2011, explaining to the Tribunal why she sent the appeal submissions and attachments in "two batches, that delayed the delivery of the fax":

The delay in delivering the submissions was due to this being a collective submission writing process whereby by my Associate Lawyer was responsible for the bulk of the submission, my Assistant carried out the formatting and I did a final review. I was dealing with a number of urgent matters yesterday and in my review, wished to ensure not only that the substance of the submission was of a high standard, but that it was also typo free and formatted in a manner which made it flow better and more readable. I did not wish to lower my standards for the submission although I was aware I was up against a tight timeline. At one point, I did consider ceasing my review in favour of sending it in, typos and all, but I could not relax my standards to do this.

15. Counsel then goes on to admit that her fax machine records show that the submission portion of the appeal was transmitted at 4:29 p.m. and that transmission ended at 4:30 p.m. However, the attachments were delivered subsequently by a fax transmission that started at 4:55 p.m. and ended at 4:59 p.m.
16. In her final submissions on the issue of the delivery of the Appeal, counsel states that she received firm instructions from her client, Sutherland Hills, to file an appeal in late March, before she sent a letter dated March 28, 2011, to Ms. Fabris putting her on notice of Sutherland Hills' intention to appeal if Ms. Fabris did not accept Sutherland Hills' offer to settle (which offer was left open for acceptance until 4:30 p.m. on April 4, 2011).

17. Counsel also indicates that, when on April 4, 2011, her office received Ms. Fabris' letter of March 31, 2011, rejecting Sutherland Hills' offer to settle, she communicated this to her client, and her office commenced preparations to draft the appeal of the Determination. She admits that the late filing of the appeal did not have anything to do with her client, but was the result of the work demands of her office and the decision she made about the order in which to fax the appeal to the Tribunal.
18. Counsel attaches records of her office fax machine evidencing that the first fax transmission from her office to the Tribunal commenced at 4:29 p.m. and ended at 4:30 p.m. on April 18, 2011, and the second transmission containing the attachments commenced at 4:55 p.m. and ended at 4:59 p.m. on the same date. These fax records dispute the assertion of Ms. Fabris' counsel who, in his submissions (which I refer to below), asserts that the delay in the filing of Sutherland Hills' appeal was two (2) business days after the expiry of the appeal deadline.
19. Counsel for Sutherland Hills also submits that in her settlement offer letter of March 28, 2011, to Ms. Fabris, her office specifically advised Ms. Fabris that if she did not accept Sutherland Hills' offer to settle, then the latter would be proceeding with the appeal of the Determination. In response to the said letter, counsel notes that she received Ms. Fabris' reply dated March 31, 2011, in which Ms. Fabris advised that she was aware that counsel would be acting on behalf of Sutherland Hills and filing an appeal with the Tribunal. Therefore, counsel for Sutherland Hills submits that Ms. Fabris was aware of Sutherland Hills' intention to appeal before the expiry of the appeal.
20. Counsel also advises that the Delegate was aware of Sutherland Hills' intention to appeal the Determination by late March 2011 as she telephoned the Delegate herself to advise in late March 2011.
21. Counsel also submits that extending the appeal deadline to allow Sutherland Hills' appeal would result in no harm to Ms. Fabris. She further submits that the claim of Ms. Fabris' counsel that Ms. Fabris will suffer harm is nothing more than the "normal outcome of an appeal, which is that the Respondent to the appeal must file a response to the appeal and may, if she chooses, retain legal counsel".
22. Lastly, counsel submits that one of the elements in the tests the Tribunal must consider in determining whether to extend the time for filing an appeal is whether the appellant's case "might" succeed and not whether it "will" succeed. She then reasons:

The appeal alleges errors of laws which are significant. These errors of law arise out of, in one instance, critical evidence which was before the Delegate at the hearing and which the Determination does not address and in the other case, by the Delegate's improper importation of 'intent' into his legal analysis. The arguments are strong and if accepted, the Appellant's case will succeed. The issues are also important issues in terms of direction to Delegates when conducting hearings which are usually carried out by unrepresented parties and to Delegates who are responsible for applying multiple state (sic) legal tests (such as the three stage analysis under s. 66) to the evidence.
23. In summary, counsel for Sutherland Hills submits that Sutherland Hills should not be prejudiced by her own late filing of the appeal "by minutes" and that there is no prejudice to Ms. Fabris and, thus, no reason not to permit the late filing of the appeal.

### **SUBMISSIONS OF MS. FABRIS**

24. Counsel for Ms. Fabris indicates that the applicable appeal period for the Determination which extends 30 days after the service of the Determination by registered mail is a generous and fair amount of time for one to

appeal, and that the “primary cause for the late filing of the appeal is Sutherland Hill’s failure to instruct its lawyers to promptly file its appeal”.

25. Counsel for Ms. Fabris acknowledges in his submissions that Ms. Fabris indeed received the letter dated March 28, 2011, from counsel for Sutherland Hills expressing Sutherland Hills’ intention to appeal unless Ms. Fabris accepted the settlement offer, and also confirms Ms. Fabris’ letter of March 31, 2011, to counsel for Sutherland Hills, *inter alia*, confirming her understanding that counsel would be acting on behalf of Sutherland Hills.
26. However, counsel for Ms. Fabris argues that Sutherland Hills and its lawyers should have acted promptly and efficiently from March 31, 2011, to prepare and file the appeal. He states that while Ms. Fabris was aware of Sutherland Hills’ intent to bring an appeal of the Determination, she did not expressly state “time shall be of the essence”, although she had “every right to rely upon the expectation that with lawyers now acting, Sutherland Hills would strictly abide by the applicable rules and time limits”.
27. Counsel for Ms. Fabris also submits (albeit mistakenly as to time) that the late filing of the appeal by two business days after the deadline may not constitute “an unreasonably long delay” but in light of the exchange of correspondence between the parties in context of settlement discussions Sutherland Hills’ counsel was or should have been on notice to follow the appeal rules of the Tribunal and in this sense, the “lateness in filing is significant, substantial, unreasonable and unexplained”.
28. Counsel for Ms. Fabris further submits that the exchange of correspondence between the parties would suggest that Sutherland Hills was “more determined to obtain a compromise of Ms. Fabris’ award than to bring a meritorious appeal” and it is not “clear that Sutherland Hills always intended to bring the appeal”.
29. On the issue of the harm to Ms. Fabris if an extension of appeal were allowed to Sutherland Hills, counsel for Ms. Fabris submits that:

...Sutherland Hill’s [*sic*] decision to involve legal counsel and bring the appeal has obliged Ms. Fabris to also retain legal counsel to assist her in this matter. As a result Ms. Fabris is being put to significant financial expense and hardship in her effort to maintain what is a fair and just Determination provided by the Delegate. An extension of the appeal deadline herein will compound and continue her expense and hardship. If the appeal is without merit, Ms. Fabris’ hardship is further compounded.

30. Finally, counsel for Ms. Fabris argues that Sutherland Hills’ appeal is “not strong, and, indeed, is entirely without substance or merit” and “falls far short of establishing any errors of fact or law in the Determination” and, therefore, an extension should be denied.

## **SUBMISSIONS OF THE DIRECTOR**

31. As indicated previously, the Director takes no position on Sutherland Hills’ application for an extension of time to file an appeal. The Director only makes submissions on the substantive grounds of Sutherland Hills’ appeal.

## **ANALYSIS**

32. 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.

33. It should be noted that the criteria above are not conjunctive in nature (See *Re Patara Holdings c.o.b. Best Western Canadian Lodge*, BC EST # D010/08, reconsideration dismissed BC EST # RD053/08).

34. Having reviewed the considerations in *Blue World IT Consulting Inc., supra*, in context of the facts in this case, and for the reasons set out below, I find that Sutherland Hills has satisfied the criteria for granting an extension of time to file an appeal.

35. While it is commendable that counsel for Sutherland Hills wanted to make sure, before faxing her client's appeal to the Tribunal, that the appeal submissions were "of high standard", "typo free" and "flow(ed) better and readable", it would have been advisable for her to be more mindful of the deadline for filing an appeal and started preparing the submissions sufficiently in advance. I would like to think that most, if not all counsel, want to produce good quality submissions for their clients and simply having to deal with other commitments at work and desire to do good quality work would not, in my view, justify as "reasonable and credible explanation for failing to file an appeal in a timely fashion". However, against that, I note that there is evidence of Sutherland Hills' intention to appeal the Determination in advance of the expiry of the appeal deadline. Counsel for Sutherland Hills contacted the Delegate in late March 2011 to advise the Delegate of Sutherland Hills' intention and the correspondence between counsel for Sutherland Hills and Ms. Fabris indicates that Ms. Fabris knew of Sutherland Hills' intention to appeal in the event the settlement discussions failed as they did.

36. I am also very mindful of the actual delay in filing of the Appeal by Sutherland Hills counsel. At most, the total delay did not exceed one-half hour based on the fax records of counsel for Sutherland Hills. While counsel for Ms. Fabris submits the delay was 2 days, I think counsel is mistaken in this regard. I agree with counsel for Sutherland Hills that there is no real prejudice to Ms. Fabris arising out the slight delay in the appeal filed by Sutherland Hills. As for the argument of counsel for Ms. Fabris that Ms. Fabris felt obliged to retain counsel in response to Sutherland Hills decision to retain counsel in the Appeal and this will result in a "significant financial expense and hardship" and consequently prejudice to her if an extension of time to appeal is granted to Sutherland Hills, I am not persuaded that this constitutes prejudice to Ms. Fabris. I am, however, persuaded with the argument of counsel for Sutherland Hills that filing a response to an appeal is something that is part of the "normal" process and the respondent is entitled to, if she decides, to employ legal counsel to assist her in the process as Ms. Fabris has done. Incurring legal expenses in such case, in my view, does not constitute prejudice arising out of the slightly late filed Appeal of Sutherland Hills.

37. With respect to the final consideration in *Blue World IT Consulting Inc.*, I note that the merits of Sutherland Hills' 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 it might succeed" (*Re Omolabi c.o.b. Just Beauty*, BC EST # D193/04; *Re BNN Enterprises Ltd.*, BC EST # D165/04). While I do not intend to review the substantive submissions of Sutherland Hills in any detail here, I have reviewed the submissions and note that the appeal is largely based on allegations of errors of law on the part of the Director. In my view, Sutherland Hill raises some serious issues in its appeal including an allegation that the

Delegate in making the Determination did not consider some “critical evidence” before him and in another instance, an allegation that the Delegate improperly imported “‘intent’ into his legal analysis” leading him to err in his conclusion on the penultimate issue in this case, namely whether Ms. Fabris quit or Sutherland Hills terminated her employment. As indicated, I find that Sutherland Hills raises some serious issues in its appeal. I find the Appeal is not frivolous and there is a strong *prima facie* case that the Appeal might succeed.

38. On the balance, therefore, I will allow an extension of time for Sutherland Hills to file its appeal late.

### **ORDER**

39. Pursuant to section 109(1)(b) of the *Act*, Sutherland Hills is granted an extension of time for filing an appeal.

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