

An appeal

- by -

MDK Enterprises Inc. and 13192427 Enterprises Inc. carrying on business as
Wood Lake Teddy Bear Resort
(Appeal filed by Directors of 13192427 Enterprises Inc.)
("the Company")

- 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/42

DATE OF DECISION: June 8, 2010

DECISION

SUBMISSIONS

Paul and Agnes Bereznicki	on behalf of 13192427 Enterprises Inc.
Roger Weatherly	on his own behalf
Terry Spicer	on her own behalf
Kathleen Demic	on behalf of the Director of Employment Standards

OVERVIEW

1. Roger Weatherly (“Weatherly”) and Terry Spicer (“Spicer”) (collectively the “Complainants”) filed a complaint pursuant to section 74 of the *Employment Standards Act* (the “*Act*”) alleging that their employer, MDK Enterprises Inc. (“MDK”) and 13192427 Enterprises Inc. (“the Company”) jointly carrying on business as Wood Lake Teddy Bear Resort (the “Resort”), contravened the *Act* by failing to pay them regular wages (“the Complaint”).
2. Subsequently, the Director’s delegate (“the Delegate”) conducted her investigation of the Complaint. In her investigation, the Delegate spoke with, *inter alia*, Mr. Paul Bereznicki (“Mr. Bereznicki”), one of the directors of the Company, who indicated he was not involved in hiring the Complainants. Mr. Bereznicki confirmed to the Delegate that it was Mr. Derek Niewinski, one of the directors of MDK, who, on his own initiative, hired the Complainants. The Delegate spoke to Mr. Niewinski and subsequently, on August 13, 2009, issued her preliminary findings to Mr. Niewinski and provided the latter an opportunity to respond by a set date.
3. After the expiry of time for responding to her preliminary findings, Mr. Niewinski contacted the Delegate and requested an extension of time to respond, as he wanted to communicate with his lawyer, Mr. Jasroop Grewal (“Mr. Grewal”) and also his business partner, Mr. Bereznicki. The Delegate acceded to Mr. Niewinski’s request and gave the Resort an extension of one week for that purpose.
4. Subsequently, on September 28, 2009, the Delegate received written submissions of Mr. Grewal dated September 24, 2009. In the said submissions, Mr. Grewal represented himself as counsel for the Resort and not simply counsel for one or another of the partners in the Resort.
5. After completing her investigation, on January 26, 2010, the Delegate issued her determination finding the Resort to have contravened sections 17 and 18 of the *Act* for failing to pay the Complainants regular wages and annual vacation pay (“the Determination”). The Delegate further ordered accrued interest pursuant to section 88 of the *Act* for an all-inclusive sum of \$20,023.33.
6. The Delegate also issued two (2) administrative penalties against the Resort of \$500.00 each for contraventions of sections 17 and 18 of the *Act* for a total sum of \$1,000.00.

7. On March 5, 2010, Mr. Grewal filed an appeal of the Determination on the grounds that the Director erred in law in making the Determination and evidence has become available that was not available at the time the Determination was being made and asked the Tribunal change or vary the Determination or cancel it. In paragraph 1 of the appeal form, it is instructive that Mr. Grewal identifies both MDK and the Company as the entities making the appeal.
8. Further, in his written submissions in the appeal, Mr. Grewal is representing the Resort, which is a partnership of both entities, MDK and the Company.
9. This Tribunal considered the Resort's appeal of the Determination and confirmed the Determination in a compendium decision to this decision in BC EST # D057/10.
10. Subsequently on March 26, 2010, Mr. Bereznicki and his wife, who is also a director with the Company, Ms. Agnes Bereznicki ("Ms. Bereznicki") (collectively "the Bereznicki's"), separately filed a late appeal of the Determination on behalf of the Company. It is important to note that in the Company's appeal form, the Bereznicki's do not check off any of the appeal grounds allowed under section 112 of the *Act* or the boxes requiring the appellant to identify what remedy or remedies are sought in the appeal. In *Re Flour Child Flour Child Bakeries Corp.*, BC EST # D094/06, this Tribunal adopted the views expressed by the Tribunal in *Triple S Transmission Inc.* (BC EST # D141/03) that the Tribunal should not "mechanically adjudicate an appeal based solely on the particular 'box' that an appellant has checked off" or not and referred to the oft quoted passage in *Triple S Transmission*:

When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, prima facie, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

11. While I concur with the views expressed in the above referenced passage in *Triple S Transmission Inc.*, in this case, I note that in addition to not having the benefit of the appeal grounds nor the remedies sought delineated in the appeal form, the written submissions of the Bereznicki's are somewhat unclear as to the grounds of appeal they may be invoking. The written submissions are delineated verbatim as follows:

Agnes and Paul Bereznicki

DIRECTORS OF 13192427 ENTERPRISES INC

To Whom may consider [sic]:

Re Roger Weatherly and Terry Spicer Employment.

We had no part of [sic] their employment.

Derek Niewinski [sic] MDK Enterprises employed Roger Weatherly and Terry Spicer as his employees.

We had no dealing with them.

On several occasions we advised Derek Niewinski that he made a poor decision of hiring them as his managers and he should terminate their employment as the very beginning but he would not listen.

After all they were his employees.

We could not respond to this letter in proper time because the determination letter was send [sic] to old address

New address [sic] 443 Cascia Drive Kelowna BC v1w 3c7

Sincerely

Agnes and Paul Bereznicki

12. The Bereznicki's essentially repeat what Mr. Bereznicki told the Delegate during the investigation of the Complaint, namely, that they were not involved in the hiring of the Complainants. In addition, the Bereznicki's now suggest that they were against Mr. Niewinski hiring the Complainants as the Resort's caretakers and appear to be dissociating the Company and themselves as having any employment ties with the Complainants although they do not deny that the Complainants worked for the Resort in which the Company is a partner with MDK.
13. The Bereznicki's also do not deny that Mr. Grewal was acting as counsel for both MDK and the Company doing business as the Resort when he made written submissions in the investigation of the Complaint and subsequently when he made the written submissions in the Resort's appeal of the Determination.
14. However, with respect to the late appeal of the Determination filed on behalf of the Company, I note the Director's submissions that the Delegate contacted Mr. Bereznicki by telephone earlier in the investigation of the Complaint and the latter, as a result, was aware of the Complaint and the investigation of the Complaint. The Director notes that Mr. Bereznicki referred him to his partner, Mr. Niewinski, who, as indicated earlier, was a director of MDK.
15. The Director also notes that a corporate search of the Company conducted on November 9, 2010 (a copy of which is enclosed with the Director's submissions) showed the Bereznicki's at the 559 Truswell Road address in Kelowna ("the Truswell Address") and also showed the same address as the registered and records office address of the Company and the Delegate sent the preliminary findings as well as the Determination and the Reasons for the Determination to both the Company and the Bereznicki's at the Truswell Address. The Director also notes and the Canada Post tracking searches appear to show that while the earlier package, presumably the preliminary findings of the Delegate, were returned unclaimed to the Employment Standards Branch, the later packages, the Determination and the Reasons for the Determination, appear to have been redirected to the Bereznicki's new address.
16. The Director has also submitted a further corporate search of the Company dated April 20, 2010, which continue to show the Truswell Address as the Bereznicki's address as well as the registered and records office of the Company.
17. The Director argues that there is no compelling reason to allow an extension of time for the Bereznicki's to file an appeal of the Determination in this case and therefore their appeal should be denied.
18. Section 109(1)(b) of the *Act* provides that the Tribunal may extend the time for requesting an appeal even though the time to appeal has expired. This Tribunal in *Re Mann Farms Ltd.*, BC EST # D038/10, stated that the onus is on the party seeking an extension of time to appeal to show that there exist compelling reasons before the Tribunal will exercise its discretion under the said provision in the *Act* to grant an extension of the appeal period. In *Re Mann Farms Ltd.*, the Tribunal then considered the following non-exhaustive factors delineated by the Tribunal in *Re Blue World It Consulting Inc.*, BC EST. # D516/98, for determining whether or not an extension of time to appeal should be granted:
 - (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. In this case I find the Bereznicki's submissions do not satisfy me on any of the criteria set out in *Re Blue World It Consulting Inc.* for granting an extension of time to appeal. It is the responsibility of the Company and the Bereznicki's to update their contact information in the corporate registry which they apparently failed to do as the Truswell Address continued to show on the second registry search of the Company the Director conducted almost 5 months after the first one was conducted by the Delegate.
20. I also find it curious that Mr. Bereznicki, who participated earlier in the investigation of the Complaint, albeit in a very limited fashion in light of his limited role in the employment of the Complainants, did not stay in touch with the Delegate to enquire of the outcome or at least advise the Director of his and the Company's change of address. I also find it curious (and it is unexplained in the submissions) why the Bereznicki's would not know of the Determination earlier from their partners, the Niewinski's, assuming the redirected Determination was not received by them at their new address as suggested in their final reply submissions.
21. For the reasons mentioned above as well as the consideration in section 2(d) of the *Act*, namely, the purpose of the *Act* "to provide fair and efficient procedures for resolving disputes over the application and interpretation" of the *Act*", I deny the Bereznicki's appeal of the Determination on behalf of the Company.
22. If I am wrong in denying an extension of time to appeal to the Bereznicki's or the Company, I am not convinced that the Company and the Bereznicki's, on behalf of the Company, can appeal the Determination independently and also jointly with MDK in the Resort's appeal. Mr. Grewal represented the Company (as well MDK), in my view, in the Resort's appeal of the Determination, which I have already decided as indicated earlier. Paragraph 1 in the Resort's appeal form filed by Mr. Grewal states clearly that the entities appealing are both MDK and the Company. If the Bereznicki's or the Company did not authorize Mr. Grewal to file the appeal of the Determination then the Bereznicki's have not argued this in their appeal. To allow the Bereznicki's to file their appeal, notwithstanding the lack of substantive merit in their appeal, would be contrary to the stated purpose in section 2(d) of the *Act* as it is neither fair nor efficient to allow a an appellant to participate in two separate appeals of the same determination.
23. If I am wrong in this conclusion, I find in the alternative that the Bereznicki's or the Company's appeal is without any merit as it is not based on any available ground of appeal in section 112 of the *Act*. I also find the suggestion in the Bereznicki's submissions that the Complainants were Mr. Niewinski's and not the Company's employees jointly somewhat disingenuous. The Complainants, while interviewed and hired by Mr. Niewinski, were not hired for Mr. Niewinski or MDK but rather for the Resort in which the Company was a partner equally with MDK. In the circumstances, I dismiss the Company's appeal.

ORDER

24. The request to extend the time limit for submitting an appeal pursuant to section 109(1)(b) of the *Act* is denied. The appeal is dismissed and the Determination dated January 26, 2010, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal