

An appeal

- by -

0867213 B.C. Ltd. carrying on business as Knight & Day Restaurant
("Knight & Day")

- 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.: 2012A/54

DATE OF DECISION: July 23, 2012

DECISION

SUBMISSIONS

Amarjit Singh Jhutti	on behalf of 0867213 B.C. Ltd. carrying on business as Knight & Day Restaurant
Cheri Muldoon	on her own behalf
Karpal Singh	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) brought by 0867213 B.C. Ltd. carrying on business as Knight & Day Restaurant (“Knight & Day”) of a determination that was issued on April 12, 2012 (the “Determination”).
2. Knight & Day operated a restaurant in Surrey, British Columbia, and employed Cheri Muldoon (“Ms. Muldoon”) and Darryl Verma (“Mr. Verma”) (jointly the “Complainants”) as a cook and a floor manager respectively. Both Ms. Muldoon and Mr. Verma filed their complaints under section 74 of the *Act* alleging that Knight & Day contravened the *Act* by failing to pay them wages. Knight & Day went out of business on November 30, 2010, and while the Employment Standards Branch received a number of complaints from employees of Knight & Day for unpaid wages and reached a final settlement of most claims, the complaint of Mr. Verma was not settled nor was a part of Ms. Muldoon’s complaint for compensation for length of service. As a result, the Delegate of the Director investigated both Complainants’ outstanding complaints and sought evidence from both the Complainants and Knight & Day. After completing his investigation, the Delegate concluded in the Determination that Knight & Day failed to pay wages owed to the Complainants and contravened sections 17, 18 and 63 of the *Act*, as well as section 46 of the *Employment Standards Regulation* (the “*Regulation*”). The Delegate ordered Knight & Day to pay the Complainants a total of \$2,443.66, an amount that included wages and accrued interest pursuant to section 88 of the *Act*.
3. The Delegate also imposed three (3) administrative penalties of \$500.00 each on Knight & Day pursuant to section 29(1) of the *Regulation* for contraventions of sections 17, 18, and 63 of the *Act*.
4. The total amount of the Determination is \$3,943.66.
5. Knight & Day appeals the Determination on the sole basis that the Director failed to observe the principles of natural justice in making the Determination.
6. Knight & Day is seeking the Tribunal to refer the Determination back to the Director, although the submissions in support would suggest that it wants the Determination cancelled.
7. I note the deadline for the appeal was May 22, 2012, as set out in the Determination; however, Knight & Day filed the appeal on May 24, 2012, two (2) days past the deadline. Section 109(1)(b) of the *Act* affords the Tribunal the discretion to extend the deadline for requesting an appeal when the appeal is filed after the expiry of the appeal period. I will, in this decision, only consider the matter of whether the Tribunal should exercise its discretion and extend the deadline for Knight & Day to appeal and, if my decision is in the

affirmative, then the parties will be invited to make full submissions on the substantive issue(s) raised in the 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 may be adjudicated on the basis of the section 112(5) “record” and the written submissions of the parties and the reasons for the Determination.

ISSUE

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

FACTS

Ms. Muldoon

10. Ms. Muldoon was employed as a cook with Knight & Day from February 5, 2010, to October 28, 2010. In her complaint against Knight & Day, Ms. Muldoon claimed the latter failed to pay her overtime pay, made unauthorized deductions from her wages and failed to pay her compensation for length of service. However, all her claims but for compensation for length of service were settled in advance of the investigation by the Delegate.
11. With respect to her claim for compensation for length of service, Knight & Day took the position that Ms. Muldoon was dismissed for cause and therefore not entitled to compensation for length of service. Knight & Day, more specifically, alleged that she stole boxes of meat and took meals home, which was tantamount to theft. Knight & Day, through one of its Directors, Amarjit Singh Jhutti (“Mr. A. Jhutti”) also claimed that there was a video footage showing Ms. Muldoon taking food home and described the video footage but did not produce it for the Delegate.
12. Ms. Muldoon, on her part, denied stealing any food. She admitted to taking a meal home but a manager of Knight & Day named Jotis gave her permission to take the meal home. She unequivocally denied the allegation that she stole from Knight & Day and submitted that her employment was terminated without cause.
13. The Delegate in concluding that Ms. Muldoon’s employment was terminated without cause stated that Knight & Day did not provide him with a copy of the video to independently verify Knight & Day’s claims about the contents of the video footage. The Delegate further stated:

Knight & Day also claimed that other employees saw the video including Mr. John Racchi (the head chef) and someone at Metroguard Security Patrol but did not provide any evidence or statements from them. The claim that Mr. John Racchi and Metroguard Security Patrol saw the footage is hearsay evidence and there is no evidence before me to substantiate or corroborate Knight & Day’s claim regarding the content of the video footage. Accordingly, I cannot give much weight to this claim. It is Ms. Muldoon’s position she purchased the meal (at 15% discount) and that she took the meal with the consent of “Jotis”. Knight & Day did not provide any evidence to show that Ms. Muldoon did not get the consent. Further, even if the video footage confirms that Ms. Muldoon took the meal, Knight & Day failed to show that proper investigation was conducted to show that the meal was taken without consent or that Ms. Muldoon had the intention to stealing. Accordingly, I find that Knight & Day failed to prove on a balance of probabilities that Ms. Muldoon stole from Knight & Day and as such, she is entitled to compensation for length of service.

14. Based on Ms. Muldoon's term of employment with Knight & Day, more than three months but less than a full year, the Delegate awarded her one week's wages as compensation for length of service.

Mr. Verma

15. Mr. Verma was employed as a floor manager with Knight & Day and in his complaint against Knight & Day, he claimed that the latter owed him regular wages, overtime pay, holiday pay, annual vacation, and compensation for length of service.
16. While Mr. Verma claims his employment started on March 8, 2010, and terminated on November 4, 2010, Knight & Day states his employment with Knight & Day was from May to July 2010 only. Thereafter, as of August 2010, Knight & Day states that Mr. Verma's employment was with his father, Dipak Verma ("Mr. D. Verma"). In preferring the evidence of Mr. Verma over Knight & Day's and concluding that the latter employed Mr. Verma from May to November 4, 2010, the Delegate stated:

I have reviewed all the information and evidence provide[d] by both parties. I find that Mr. Verma was employed by Knight & Day from May to November 4, 2010, based [on] the following reasons:

- The addendums provided by Knight & Day did not show that Mr. Verma was employed by Mr. Dipak Verma but showed that Knight & Day was an independent business entity and the owners were Mr. A. Jhutti and Mr. G. Jhutti. The addendums did not show Mr. Dipak Verma as the employer as claimed by Knight & Day;
- Mr. Dipak Verma denied hiring Mr. Verma. Equally, Mr. Verma also denied being hired by Mr. Dipak Verma. While I am mindful of their family relationship, there is no evidence before me to show that Mr. Dipak Verma hired Mr. Verma or paid him wages;
- Knight & Day claimed that it had evidence to prove Mr. Dipak Verma was Mr. Verma's employer but failed to provide any evidence to substantiate this claim. The only evidence provided were the addendums to a Franchise Agreement which did not prove Knight & Day's claim regarding Mr. Dipak Verma. There is also insufficient evidence before me to show (that) Mr. Dipak Verma was the employer or the associated employer with Knight & Day pursuant to Section 95 of the Act;
- All wage statements were issued by Knight & Day including a wage statement issued in October 2010 which showed payment for 55 hours of work with a year-to-date amount of \$3,935.00. This wage statement was issued by Knight & [D]ay during the period it claimed that Mr. Dipak Verma was Mr. Verma's employer. Knight & Day claimed that the wage statement was for the hours Mr. Verma worked in July 2010. In the absence of any timesheets or work schedule from Knight & Day, I could not verify this claim. Accordingly, I reject this claim as unfounded;
- The October 2011 wage statement provided by Knight & Day listed the year-to-date amount of \$3,935.00. The break in employment from August to September was for a temporary layoff period and he was recalled in October 2010 which was well within the required recall period as defined in Section 1 of the Act (temporary layoff);
- There was no dispute that upon his return in October 2010, Mr. Verma continued to work at the restaurant;
- During the fact finding meeting, Mr. A. Jhutti and Mr. G. Jhutti stated that Mr. Dipak Verma hired Mr. Verma after August 2010. However, during the meeting, they also stated that they terminated Mr. Verma's employment on October 19, 2010 because he was caught drinking. They were asked to explain the inconsistency in their statement. They responded

by stating that Mr. (Dipak) Verma hired Mr. Verma after August 2010 but they terminated his employment because he was drinking at work. I find it interesting that they would reserve the right to terminate Mr. Verma's employment while claiming that he was Mr. Dipak Verma's employee; and

- In the written statement, Ms. Navjot Bains (one of the former managers of Knight & Day) stated that Mr. Verma was caught drinking for the second time and "*After that the owners took him off the schedule and was told not to come back?*". The evidence before me is that Mr. G. Jhutti and Mr. A. Jhutti were the owners and they made the decision to remove Mr. Verma from the schedule.

17. With respect to his claim for regular wages and overtime pay, the Delegate noted that Mr. Verma said he did not receive all amounts noted in the wage statements provided by Knight & Day and produced his bank statements and a breakdown of amounts he did receive from Knight & Day. Knight & Day, on the other hand, did not provide proof of payments it says it made to Mr. Verma as set out in the wage statements nor the timesheets or work schedule relating to Mr. Verma. Therefore, based on the wage statements generated by Knight & Day and consideration of the bank statements of Mr. Verma and Mr. Verma's unchallenged evidence, the Delegate accepted Mr. Verma's claim and determined that the latter, as at the termination date of his employment on November 4, was owed regular wages and overtime in the amount of \$1,435.
18. With respect to his claim for statutory holiday pay, Mr. Verma did not provide any records or evidence in support of this claim and the Delegate, in the absence of sufficient evidence, decided not to make any order in respect to Mr. Verma's claim for statutory holiday pay.
19. With respect to his claim for compensation for length of service, Mr. Verma claimed he was dismissed without cause and Knight & Day claims he was dismissed for cause on October 19, 2010, for drinking on his shift. The Delegate, in preferring the evidence of Mr. Verma to Knight & Day's and concluding that Mr. Verma was dismissed without cause states:

Knight & Day is alleging the Mr. Verma was terminated on October 19, 2010 for drinking during his shift. However, evidence before me shows that Mr. Verma's last day was on November 4, 2010. There is no evidence before me to show that Knight & Day had any policies or procedures relating to employee conduct, especially in dealing with drinking. Further, other than a written statement from Ms. Bains, Knight & Day also did not provide any documents or evidence relating to Mr. Verma's termination due to drinking.

I note that Knight & Day did not keep any records or documents when Mr. Verma's employment was terminated. I am also mindful that Ms. Bains provided a written statement based on her memory more than one year after Mr. Verma was terminated. She is also related to the owners of Knight & Day. While I have given some weight to her submissions, I am not satisfied that her written submission alone is sufficient for Knight & Day to discharge the onus of proving just cause termination. Ms. Bains did not provide specific details regarding Mr. Verma's drinking such as the date, time and specifics relating to the drinking. It is unclear whether Mr. Verma was in fact drinking. Further, the statement that another employee named Veronica witnessed Mr. Verma's drinking without any direct evidence from her is hearsay evidence and as such, I am not giving much weight to this claim.

Mr. Verma denied that he consumed alcohol during his shifts and he was never told that this was the reason for his termination. He claimed that Knight & Day removed him from the daily schedule. This is consistent with Ms. Bains statement that "*the owners took him off the schedule and was told not to come back?*". I find on a balance of probabilities that Knight & Day did not tell Mr. Verma that his employment was terminated. He was never given any opportunity to explain or defend himself against the allegation of drinking. Based on my review of all the information and evidence before me in its entirety, I find on a balance of probabilities that there is insufficient evidence to prove that Mr. Verma was drinking.

I find that Knight & Day failed to prove that Mr. Verma was drinking and he is entitled [to] compensation for length of service.

20. As with Ms. Muldoon, the Delegate noted that Mr. Verma was employed with Knight & Day for more than three months but less than 1 year and awarded him one week's wages based on his hours of work in the last six weeks as he did not work all eight weeks prior to the termination of his employment. His termination pay totaled \$154.00.
21. In addition, since Knight & Day did not show any vacation payment to Mr. Verma on the wage statements, the Delegate awarded Mr. Verma annual vacation pay of \$170.86 based on Mr. Verma's total wages earned during his period of employment.
22. The total amount Mr. Verma was awarded in the Determination, inclusive of interest pursuant to section 88 of the *Act*, is \$1,835.80.
23. In addition, the Delegate levied three administrative penalties of \$500 each as previously noted.

SUBMISSIONS OF KNIGHT & DAY

24. Knight & Day filed its appeal of the Determination on May 24, 2012, two days after the expiry of the appeal deadline of May 22, 2012. Knight & Day claimed that the delay in filing its appeal with the Tribunal was due to a misunderstanding. Apparently Knight & Day, according to Jasmin Jhutti (Ms. Jhutti), understood that its appeal had to be sent to the Delegate. Ms. Jhutti claims that she tried to send the appeal to the Delegate by fax on Sunday May 20, 2012, but the fax did not go through successfully. She was also unable to contact anyone at the Employment Standards Branch as it was a long weekend but on Tuesday, May 22, she discovered from another officer at the Branch that the Delegate had transferred to another location and got his contact information. She then left a voicemail for the Delegate on May 22, 2012, and asked that he contact her.
25. The Delegate, upon returning to his office on May 23, discovered Ms. Jhutti's voicemail and email and he emailed her and also spoke with her on the same day. He advised her that he could not accept Knight & Day's appeal and that she should contact the Tribunal.
26. With respect to the merits of the appeal, Knight & Day does not present any evidence in support of its natural justice ground of appeal. Instead, Knight & Day, through its Director, Mr. A. Jhutti, reiterates Knight & Day's argument during the investigation of the complaint. More particularly, in his written submissions, Mr. A. Jhutti states that Knight & Day is appealing the Determination because the "reasons were incorrect". He states that Ms. Muldoon was terminated for cause because she was "caught stealing". In the case of Mr. Verma, he states that the latter was paid in full for all hours worked and he was terminated for cause as he "was caught drinking on the job". He further states that Mr. Verma's father Mr. D. Verma who was associated with the franchisor company wanted his son to continue working "for him at Knight & Day" and therefore Knight & Day was not "responsible for [Mr. Verma]."

DIRECTOR'S SUBMISSIONS

27. The Director submits that Knight & Day received the Determination within days after it was issued and had ample time to submit its appeal but chose to act only towards the end of the appeal period, which resulted in the late appeal. The Director also notes that the Determination sets out both the appeal deadline and the Tribunal's contact information, which is delineated just below the appeal expiry date in the Determination. According to the Director, Knight & Day was aware of the appeal deadline as is evidenced by Ms Jhutti's

attempt to fax the appeal to the Delegate on May 20, 2012, and subsequent telephone message. The Director also notes that if Knight Day is using the Tribunal's appeal forms, the contact information as well as instructions on the form would also have directed Knight & Day to file the appeal with the Tribunal before or on the expiry date. Notwithstanding, the Director states that Knight & Day did have a *bona fide* intention to appeal before the expiry date based on Ms. Jhutti's telephone call and email to the Delegate on May 22, 2012, asking the Delegate to contact her regarding the appeal.

28. The Director states that while she will not be prejudiced by the late appeal, the two employees, Ms. Muldoon and Mr. Verma, will be as they have yet to receive payment of their wages.
29. The Director also submits that the "most important factor for consideration" in the application to extend the time line for Knight & Day to appeal is whether Knight & Day has "a strong case that might succeed". The Director argues that it does not as Knight & Day has adduced no evidence in support of its allegation that the Director breached the principles of natural justice in making the Determination. Further, the Director states that Knight & Day was given sufficient opportunity to adduce evidence relating to the termination of the employment of both Ms. Muldoon and Mr. Verma but failed to do so. According to the Director, Knight & Day is merely attempting to reargue its case and therefore the appeal should be dismissed.

THE COMPLAINANTS' SUBMISSIONS

30. While Mr. Verma has not made any appeal submissions, Ms. Muldoon has. Ms. Muldoon rejects the reasons of Knight & Day for filing the appeal late and states that the Delegate noted in the Determination his new contact information and Knight & Day had a month to appeal and failed to do so. Ms. Muldoon also appears to support the Director's contention that Knight & Day is rearguing its case.

ANALYSIS

31. 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.
32. 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).
33. Having reviewed the considerations in *Blue World IT Consulting Inc.*, *supra*, in context of the facts in this case, and for the reasons delineated below, I find that Knight & Day, on balance, has failed to satisfy the criteria for granting an extension of time to file an appeal. I will set out my reasons below.
34. With respect to the first two criteria in *Blue World IT Consulting Inc.*, *supra*, while I think Knight & Day was careless in not carefully reading the instructions in the Determination and particularly the instructions on the top of the Appeal Form which expressly directs an appellant to file their Appeal Form with the Employment

Standards Tribunal, I do not find Knight & Day's explanation for filing the appeal late based on its misunderstanding unreasonable or incredible. Further, I find that there is sufficient evidence to establish that Knight & Day had a genuine and on-going *bona fide* intention to appeal the Determination. More particularly, Ms. Jhutti attempted to fax the Appeal Form to the Delegate in advance of the expiry of the Appeal deadline and attempted to contact the Delegate in advance of the expiry of the appeal deadline - she left the delegate a voicemail message asking him to contact her about the appeal on May 22, 2010. While prudence would dictate that Knight & Day should have acted much earlier and not waited until the eleventh hour to act on its appeal, I find that the first two criteria in *Blue World IT Consulting Inc.*, *supra*, are satisfied in this case.

35. With respect to the third criteria in *Blue World IT Consulting Inc.*, while there is no evidence that the Complainants were notified of Knight & Day's intention to appeal, I note that Ms. Jhutti did attempt to contact the Delegate before the expiry of the deadline for filing the appeal although the Delegate received the message from Ms. Jhutti after the expiry of the appeal date when he returned to work.
36. With respect to the fourth criterion, the Director admits that the granting of an extension of time to Knight & Day to file an appeal will not prejudice her but the Complainants will be delayed in receiving payment awarded to them in the Determination. I find that the delay is *de minimus* and not really prejudicial to the Complainants, if an extension is granted to Knight & Day to file its appeal.
37. However, I find that the last of the five criteria in *Blue World IT Consulting Inc.*, to be determinative in this case, namely, whether there is a strong *prima facie* case in favour of the appellant. While the merits of an appellant's appeal are not a relevant consideration for the Tribunal in deciding whether to extend the appeal period, they are considered to the extent necessary to determine if there is a "strong *prima facie* case that it might succeed" (*Re Owolabi c.o.b. Just Beauty*, BC EST # D193/04; *Re BNN Enterprises Ltd.*, BC EST # D165/04). Having said this, while I do not intend to set out the substantive submissions of Knight & Day in any great detail here, I have carefully reviewed them and note that Knight & Day has not adduced any evidence in support of its sole ground of appeal, namely, that the Director failed to observe the principles of natural justice in making the Determination. Instead, Knight & Day is challenging the Determination as having been decided "incorrectly" and goes on to reiterate the arguments it made to the Delegate in the investigation of the Complaints. More specifically, Knight & Day simply reiterates that both Complainants' employment was terminated for cause, namely, theft in the case of Ms. Muldoon and drinking during his shift in the case of Mr. Verma. Both of these arguments were found insufficiently supported in the evidence of Knight & Day during the Delegate's investigation and rejected in the Reasons for the Determination.
38. There is nothing new or anything that would qualify as "new evidence" in the appeal submissions of Knight & Day to make me conclude that there is a *prima facie* case in favour of the appellant let alone a strong *prima facie* case. I find this last consideration in *Blue World IT Consulting Inc.*, in this case, determinative. In my view it makes little sense to allow Knight & Day an extension of time to appeal only to reargue its case and challenge the Delegate's conclusions of fact, which is not the purpose of the appeal mechanism in the *Act*. I also add that to allow Knight & Day an extension of time to make its appeal in the circumstances is inconsistent with the stated purpose of the *Act* in section 2(d), namely, "to provide fair and efficient procedures for resolving disputes over the application and interpretation of (the) Act".
39. Therefore, I reject Knight & Day's application for an extension of time to appeal.

ORDER

40. Pursuant to section 114(1)(b) of the *Act*, I order the appeal is dismissed and pursuant to section 115(1)(a) I confirm the Determination issued on April 12, 2012.

Shafik Bhalloo
Member
Employment Standards Tribunal