

An appeal

- by -

Andrew Mollica, a Director and Officer of Olive U Foods Ltd.
(“Mr. Mollica”)

- 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/78

DATE OF DECISION: September 11, 2012

DECISION

SUBMISSIONS

Andrew Mollica	on his own behalf
Chantal Martel	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal filed by Andrew Mollica (“Mr. Mollica”), a Director and Officer of Olive U Foods Ltd., pursuant to subsection 112(1)(b) of the *Employment Standards Act* (the “*Act*”). Mr. Mollica appeals a determination that was issued against him on May 23, 2012, in the total amount of \$28,766.57 (the “Section 96 Determination”). Section 96(1) of the *Act* provides:

96 (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.
2. Mr. Mollica states that the Section 96 Determination should be cancelled because the Director’s delegate (the “Delegate”), who issued it, failed to observe the principles of natural justice in making the Determination.
3. I note that Mr. Mollica has filed his appeal late. The deadline for filing his appeal was July 3, 2012. Based on the Tribunal’s correspondence to Mr. Mollica dated July 10, 2012, on July 5, 2012 the Tribunal received Mr. Mollica’s incomplete appeal. Mr. Mollica, apparently, failed to provide any written reasons and argument for his appeal. He also failed to include a complete copy of the Section 96 Determination and the Reasons for the said determination and any supporting documents.
4. The same correspondence of the Tribunal indicates that the Tribunal contacted Mr. Mollica on July 6, 2012, and directed his attention to the checklist on page 2 of the Appeal Form and requested that he provide the Tribunal with the missing documents no later than 4:00 p.m. on July 16, 2012, and also informed him that where the appeal period has expired, the Tribunal may consider extending the time period for requesting an appeal pursuant to section 109(1)(b).
5. In a follow-up correspondence from the Tribunal to Mr. Mollica on July 17, 2012, the Tribunal noted that it had not received the documents it requested from Mr. Mollica in earlier correspondence by the July 16, 2012, deadline. As a result, the Tribunal stated that it was unable to proceed with his appeal and was closing its file.
6. On July 20, 2012, Mr. Mollica sent the Tribunal the missing documents the Tribunal previously requested from him. The Tribunal acknowledged receipt of Mr. Mollica’s late-filed materials in its letter of July 24, 2012, and advised Mr. Mollica that the Tribunal will now consider whether to extend the statutory time limit for filing his appeal and accept his late appeal.
7. In this decision, I will only consider the matter of whether the Tribunal should exercise its discretion under section 109(1)(b) of the *Act* to extend the statutory time limit for Mr. Mollica to appeal. If my decision is in the affirmative, only then will the parties be invited to make full submissions on the substantive issues raised in the appeal.

8. Pursuant to section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated in the *Act* (s. 103) and Rule 8 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 of whether the Tribunal should exercise its discretion to allow Mr. Mollica’s late-filed appeal may be adjudicated on the basis of the section 112(5) “record”, the Reasons for the Section 96 Determination and the written submissions of the parties.

ISSUE

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

THE FACTS

10. Olive U Foods Ltd. (the “Company”) operated a restaurant and catering business and employed Robert Peter, Sharon Reid, William Jut, Ryan Mandryk, Adam Nathani, Steven Woodrow, Sean Colcleugh, and Julia Hurlburt (collectively the “Complainants”).
11. Pursuant to section 74 of the *Act*, the Complainants filed their complaints against the Company alleging that the latter contravened the *Act* by failing to pay them all wages (the “Complaints”).
12. The Delegate conducted an investigation into the Complaints and, on February 29, 2012, issued a Determination against the Company (the “Corporate Determination”) finding the Company responsible to the Complainants for a total of \$27,873.15 in wages, inclusive of interest. The Delegate also levied administrative penalties against the Company in the total amount \$3,000.00.
13. The Corporate Determination, which included a notice to Directors and Officers explaining their personal liability under the *Act*, was sent to the Company, with copies to its registered and records office and to its sole Director and Officer, Mr. Mollica.
14. The Corporate Determination was never appealed and the appeal period expired on April 10, 2012.
15. Because the Company did not pay the amounts owing under the Corporate Determination, the Delegate pursued Mr. Mollica under section 96 of the *Act*. Based on the Delegate’s corporate search of the Company on February 6, 2012, the Delegate found that the Company was incorporated on November 17, 200, and Mr. Mollica was listed as its Director and Officer since that date.
16. In the Reasons for the Section 96 Determination, the Delegate notes that during her investigation into the Complaints, Mr. Mollica did not dispute that certain wages were owing to the Complainants but advised that some payroll records were missing as a result of a fire at the business premises. However, Mr. Mollica never provided the Delegate with any evidence thereafter confirming his initial position that wages allegedly owed to the Complainants were paid, nor did he present any evidence showing the amounts claimed by the Complainants were in error. As a result, on May 23, 2012, the Delegate issued the Section 96 Determination holding Mr. Mollica personally liable for up to two (2) months’ unpaid wages for each employee.
17. The Delegate also found sufficient evidence to hold Mr. Mollica responsible for administrative penalties issued against the Company, stating that there was evidence that Mr. Mollica “authorized, permitted and acquiesced in actions which resulted in contraventions of the *Act* and the issuance of a corporate determination against Olive U Foods Ltd.”.

SUBMISSIONS OF MR. MOLLICA

18. Mr. Mollica's late submissions in support of his appeal of the Section 96 Determination are very brief, and I propose to set them out verbatim below:

To Whom It May Concern:

I write to you today to accept my late reply to the tribunal in regards to file; 167-123 I got to my office today with a package from the employment standards branch on a determination notice from Chantal Martel. I hope you can accept this reply a couple of days late. I certainly would like to have a chance to communicate my case. Please contact me directly if you have any further question thank you. [sic]

[Signature of Mr. Mollica]

My reasons for canceling or what supporting information I have. Back in October of 2011 we suffered from a serious fire that crippled my operation. We today have no business to generate and sort of sales. The staff that is listed in this claim all worked together under the guidance of one individual. All parties involved seem to have had or they say they were treated unfair. It's a shame that it has come to this, but I had little controller of the managing leader and their doings or schedules. At this present time and with a very un clear future I see a long road a head of me to recover from this fire and a tremendous lose of business. If there is anything else you need from me please do not hesitate to call me directly. Thank you. [sic]

[Signature of Mr. Mollica]

SUBMISSIONS OF THE DIRECTOR

19. The Director submits that Mr. Mollica's appeal is without any merit and Mr. Mollica has failed to show how the principles of natural justice were breached in this case.
20. The Director also submits that Mr. Mollica has not provided an appropriate explanation for filing his appeal late.
21. The Director also notes that Mr. Mollica is not taking issue with the quantum of the Section 96 Determination or the Delegate's finding that he was a Director and Officer of the Company. The Director argues that Mr. Mollica was afforded sufficient opportunity to present his case and participated in the investigation of the Complaints before the Corporate Determination was made on February 29, 2012.
22. The Director notes that the Corporate Determination was also sent to Mr. Mollica's home address and returned by Canada Post "unclaimed".
23. The Director further submits that Mr. Mollica is appealing the Section 96 Determination after the expiry of the appeal period because the matter was referred to collections.
24. In these circumstances, the Director submits the appeal should be dismissed and the Section 96 Determination confirmed.
25. The Director has attached to her submissions copies of registered mail trace pertaining to the Corporate Determination sent to the Company and to Mr. Mollica and numerous pieces of email correspondence between Mr. Mollica and the Delegate, showing that Mr. Mollica was fully aware of the investigation of the Complaints and had an opportunity to fully participate in that proceeding.

ANALYSIS

26. Section 109(1)(b) of the *Act* sets out the Tribunal's authority to extend the time period for requesting an appeal under section 112. It states:
- 109 (1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:
- ...
- (b) extend the time period for requesting an appeal even though the period has expired;
27. The Tribunal will exercise its statutory authority to extend the time for filing an appeal only where there are compelling reasons, and the burden, on the balance of probabilities, is on the appellant to show that such reasons exist. In *Re: Tang* (BC EST # D211/96), the Tribunal stated:
- 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.
28. In *Re: Niemisto* (BC EST # D099/96), the Tribunal delineated the following considerations for deciding whether compelling reasons exist for extending the time for filing an appeal:
- (i) There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
 - (ii) There has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - (iii) The respondent party (i.e. the employer or employee), as well the Director, must have been made aware of this intention;
 - (iv) The respondent party will not be unduly prejudiced by the granting of an extension; and
 - (v) There is a strong *prima facie* case in favour of the appellant.
29. The criteria delineated above are not intended to constitute an exhaustive list, nor are they conjunctive in nature (see *Re: Patara Holdings c.o.b. Best Western Canadian Lodge*, BC EST # D010/08, reconsideration dismissed BC EST # RD053/08). The Tribunal will consider and weigh these and any other factors it considers relevant and make its decision to, or to not, exercise its discretion to extend the time for filing the appeal based on the totality of all its considerations and not a single factor.
30. Having reviewed the criteria in *Re: Niemisto* in conjunction with the facts in this case, I find that Mr. Mollica, on the balance, has failed to satisfy the criteria for granting an extension of time to file an appeal. More particularly, I find that there is lacking a reasonable and credible, or perhaps any, explanation for his failure to request an appeal within the statutory limit. More particularly, I note Mr. Mollica is not disputing receiving the Corporate Determination but, with respect to the Section 96 Determination, he is suggesting that he only received it when he got to his office. It is unclear when he got to his office but it would appear that it was around the expiry of the appeal date. However, he does not explain why he was prevented from getting the Section 96 Determination earlier. He also does not explain why, when he was asked by the Tribunal to provide the materials that would complete his appeal application by July 16, he failed to do so and allowed a few more days to pass before providing the requested materials.

31. I also find there is lacking on Mr. Mollica's part any evidence of a genuine and ongoing *bona fide* intention to appeal the Section 96 Determination. There is no evidence of any respondents, including the Director, being made aware of Mr. Mollica's intention to appeal. It would appear that only after collections proceedings had begun Mr. Mollica pursued his appeal.
32. While the delay in filing his appeal is not unreasonably long and, arguably, there may not be undue prejudice to the Complainants if the Tribunal were to grant Mr. Mollica an extension of time to appeal, I am mindful of the need for a timely disposition of an appeal and particularly 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 this Act". To allow Mr. Mollica an extension of time to file his appeal is inconsistent with the said purpose or objective of the *Act*, particularly in light of the other considerations in *Re: Niemisto, supra*.
33. Finally, with respect to the last factor, namely, whether there is a strong *prima facie* case in favour of the appellant, the Tribunal has noted in other such cases that except to the extent necessary to determine if there is a "strong *prima facie* case that might succeed", the Tribunal does not consider the merits of the appeal when deciding whether to extend the appeal period.
34. Having said this, on review of Mr. Mollica's appeal submissions, I do not find any evidence in support of the "natural justice" ground of appeal he invokes in his appeal. I also do not find any evidence in support of any other available ground of appeal under section 112 of the *Act*. Mr. Mollica is simply repeating some earlier submissions he made in the investigation of the Complaints against the Company prior to the Corporate Determination. More particularly, he reiterates that there was a fire "that crippled" the Company's operation and, thus, the Company does not have any business to generate sales and has an unclear future as a result. He also indicates that he did not have control over the "managing leader" of the Company and "scheduling". However, none of this remotely relates to any available grounds of appeal under Section 112 of the *Act*.
35. Based on the totality of Mr. Mollica's submissions and having considered the Director's submissions, I am not persuaded that Mr. Mollica has shown a strong *prima facie* case in his favour, and I find his prospect on appeal rather grim in the circumstances.

ORDER

36. I find that Mr. Mollica has failed, on a balance of probabilities, to discharge his onus of showing that the time limit for appealing the Section 96 Determination dated May 23, 2012, should be extended. Therefore, I decline to exercise my discretion to extend the appeal period. Pursuant to section 114(1)(b) of the *Act*, I dismiss Mr. Mollica's appeal.

Shafik Bhalloo
Member
Employment Standards Tribunal