



An appeal

- by -

Sunny Jaura carrying on business as Jaura Enterprises
("Jaura")

- 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.: 2006A/124 and 2006A/129

DATE OF DECISION: December 19, 2006

DECISION

OVERVIEW

1. This is an appeal by Sunny Jaura carrying on business as Jaura Enterprises (“Jaura”) under Section 112 of the *Employment Standards Act* (“*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued August 2, 2006 (the “Determination”).
2. Mr. Christos Feretos (“Feretos”) filed a complaint pursuant to Section 74 of the *Act* on or about December 28, 2005 alleging that his employer, Jaura, contravened the *Act* by failing to pay him wages at termination (the “Complaint”).
3. The Director’s delegate conducted an investigation into the Complaint in and during March to May 2006 and issued a Determination concluding that Jaura violated the *Act* and ordered Jaura to pay Feretos \$1,500.00 in compensation for outstanding wages pursuant to Section 18 of the *Act*; an additional \$300.00 for vacation pay based on the total earnings of Feretos while in the employ of Jaura pursuant to Section 58 of the *Act*; and accrued interest of \$57.23 on the said amounts pursuant to Section 88 of the *Act*, for a total of \$1,857.23. The Director also imposed two administrative penalties of \$500.00 each in respect of two separate contraventions of the *Act* by Jaura. More specifically, the administrative penalties were with respect to Jaura’s contraventions of Sections 18 (failure to pay all wages owing to Feretos within 48 hours after his employment was terminated by Jaura) and 28 (failure of Jaura to keep and produce payroll records relating to Feretos’ employment) of the *Act*.
4. Jaura is appealing the Determination on the sole ground that the Director failed to observe the principles of natural justice in making the Determination. Jaura is also seeking a suspension of the Determination pursuant to Section 113 of the *Act* and submitted written submissions in support thereof. Jaura is also requesting an oral hearing of his appeal.
5. As Jaura has filed his appeal after the expiry of the appeal period in Section 112 of the *Act*, there is a preliminary issue that needs to be dealt with, namely, whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* to extend the time period for Jaura’s appeal. The Tribunal is of the view that an oral hearing is not necessary in order to adjudicate this preliminary issue and therefore, the Tribunal will determine the preliminary issue based on the parties’ written submissions as well as the Section 112(5) “Record”.
6. If Jaura is successful in obtaining an extension of time to file his appeal, then the Tribunal will consider Jaura’s request or application for a suspension of the Director’s Determination and then ultimately Jaura’s appeal of the Determination. In such case, the respondents will be afforded an opportunity to submit a reply to the Appeal. If, however, Jaura fails to obtain an extension of time to file his appeal, then the application or request for suspension of the Determination and indeed Jaura’s appeal are moot.

ISSUES

7. The issues to be determined in this appeal are:
- Should Jaura be afforded an extension of time for requesting an appeal even though the appeal period has expired?
 - If the answer to the first question is in the affirmative, then should the Tribunal suspend the Determination as requested by Jaura?

FACTS AND ARGUMENT

8. The facts relevant to this Appeal are as follows:
- The Director's Determination was issued on August 2, 2006.
 - The Determination was sent to Jaura by registered mail on August 2, 2006 and contained information and direction on appeal as follows:

“Should you wish to appeal this Determination to the Employment Standards Tribunal, your appeal must be delivered to the Tribunal by 4:30 p.m. on September 11, 2006. Information on the Tribunal and how to appeal a Determination can be found at the Tribunal's website: www.bcest.bc.ca or by contacting the Employment Standards Tribunal at (604) 775-3512. The Tribunal is separate and independent from the Employment Standards Branch.”
 - Jaura received the Determination including the appeal information contained therein on August 8, 2006.
 - According to the delegate, after the appeal period expired on September 11, 2006, she referred the matter to collection, as Jaura had not submitted to the Employment Standards Branch the amount payable under the Determination.
 - On October 23, 2006, according to the delegate, Jaura left a voicemail message on her telephone that she forwarded to the delegate in charge of collecting the award from Jaura. The latter returned Jaura's call on the same day.
 - Jaura filed his appeal of the Determination on October 24, 2006, 43 days after the expiry of the appeal period.
 - Jaura indicates that he attempted to reach the delegate by telephone and left messages for her, but she did not return his calls (presumably before the Determination as he subsequently refers to telephone calls he made after he received the Determination).
 - Jaura also indicates that after he received the Determination, he made “three calls per week” to the delegate to inquire as to what happened “to her phoning (him) back to let (him) know the status of the case, but received no reply from the delegate.
 - Jaura states that he had made a monetary settlement offer of \$500.00 to Feretos through the delegate (presumably prior to the Determination) and claims that the delegate indicated that she would contact Feretos and return his telephone call but failed to do so.

- The delegate states that she was away from her office from August 4 to August 14, 2006 and returned on August 15, 2006.
- According to the delegate, Jaura had not left any messages on her voicemail while she was away.
- Moreover, the delegate indicates that while she was away there was another delegate who had conduct of her files and whose phone number was provided on her voicemail message. That delegate also did not receive any messages from Jaura.
- The delegate for the Director in charge of collections sent a letter dated October 13, 2006 to Jaura advising him of the collections process and the potential consequences of failure to pay by October 27, 2006.
- According to the delegate, it was only on October 23, 2006 that Jaura left a voicemail message that she forwarded to the delegate in charge of collecting the award in the Determination from Jaura.
- The delegate indicates that Jaura did not, at any time, communicate his intention to appeal the Determination to her or anyone else at the Employment Standards Branch. Furthermore, the delegate asserts that Jaura failed to provide “any good explanation for not appealing within the appeal period”.
- The delegate further submits that “Jaura did not require, nor did he seek, (her) guidance to appeal (the) Determination”.
- The delegate also submits that Jaura does not have a meritorious case on appeal, particularly since he had notice of the Complaint and ample opportunity to respond.
- The delegate also indicates that she contacted Jaura by telephone on April 2, 2006 and sent him a letter on April 27, 2006 clearly explaining Feretos’ complaint including the law governing the Complaint.
- The delegate further indicates that she asked Jaura to provide her the evidence supporting his position and enclosed a Demand for Records, which Jaura was unable to comply with.
- The delegate only issued her Determination three months after her initial telephone contact with Jaura.
- According to Jaura, this was the first time that he was dealing with the matter pertaining to the Act and did not file his appeal on time because he had been attempting to contact the delegate to inquire “about the letter” (referring to the Determination he received on August 8, 2006).
- Jaura also submits that he “had no idea of what a Tribunal consisted of and was trying to understand why (he) was involved in a Tribunal” and that he has “never in (his) life been to a Tribunal or violated any rule or regulation with the Employment Standards Act”.

⁹. I have not set out Jaura’s submissions with respect to his application for a suspension of the Determination in light of my decision on the preliminary issue of whether Jaura should receive an extension of time for requesting an appeal.

ANALYSIS

10. Section 112 of the *Act* sets out the code for any party wishing to appeal the Director's determination including the appeal period or time limit for filing an appeal. In particular, subsection 112(3)(a) and (b) provide:

"112(3) The appeal period referred to in subsection (2) is:

- (a) 30 days after the date of service of the determination, if the person was served by registered mail, and
- (b) 21 days after the date of service of the determination, if the person was personally served or served under Section 122(3)."

11. 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, and provides:

"109(1) In addition to its powers under Section 108 and Part 13, the tribunal may do one or more of the following:

...

- (c) extend the time period for requesting an appeal even though the period has expired;"

12. The Tribunal will exercise its statutory discretion to extend the time for filing an appeal only where there are compelling reasons, and the burden is on the appellant to show that such reasons exist. As indicated by the Tribunal in *Re: Tang, BC EST # D211/96*:

"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."

13. What are the factors that the Tribunal should consider in determining whether compelling reasons exist for extending the time for filing an appeal? In *Re: Dennill (c.o.b. Fibremaster Restorations & Carpet), BC EST # D080/01*, the Tribunal delineated the following criteria the appellant should satisfy in seeking an extension:

1. There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
2. There was a genuine and ongoing *bona fide* intention to appeal the Determination;
3. The respondent party as well as the Director was aware of this intention;
4. The respondent party will not be unduly prejudiced by the granting of the extension;
5. There is a strong *prima facie* case in favour of the appellant."

14. In the case at hand, I am not satisfied that an extension ought to be granted.

15. First, the Determination was served in accordance with Section 122(1) of the *Act*. The Director served the Determination on Jaura by registered mail. The Record contains an acknowledgement of receipt of the Determination on the part of Jaura on August 8, 2006. Further, the Determination received by Jaura contained instructions or direction to Jaura that if he wished to appeal, he should do so by delivering his

appeal to the Tribunal by 4:30 p.m. on September 11, 2006. It also provided him with the website address and telephone number of the Tribunal, should he wish to obtain information on the Tribunal and how to appeal the Determination. However, there is no evidence that Jaura, if he was uninformed about the appeal process, attempted to telephone the Tribunal or look up on the Tribunal's website the information on how to appeal the Determination.

16. Second, it was only after the delegate for the Director in charge of collections sent a letter to Jaura advising him of the collections process and the potential consequences of failure to pay by October 27, 2006, that Jaura filed his appeal on October 24, 2006. It is my opinion that Jaura did not make reasonable efforts to launch an appeal in a timely fashion before the expiry of the appeal period and that if he made "three calls per week" to the delegate after receiving the Determination, there would have been messages for the delegate to respond to when she returned to her office on August 15, 2006. However, there were no messages for the delegate from Jaura when she returned to her office.
17. Moreover, as the delegate indicates, during her very short absence, her voicemail provided the name of another delegate who was looking after her files and the contact information for that delegate. However, there is no evidence that Jaura contacted the latter delegate at anytime prior to the expiry of the appeal period or at all. I believe that the first time that Jaura contacted the delegate, after the Determination was issued, was on October 23, 2006, after receiving the collections letter of October 13, 2006. I, therefore, do not believe that there is a reasonable and credible explanation on the part of Jaura for failing to request an appeal within the statutory appeal period.
18. Second, I prefer the evidence of the delegate over Jaura's that Jaura did not contact her nor anyone else at the Employment Standards Branch to express "a genuine and ongoing *bona fide*" intention to appeal the Determination.
19. Third, on a related note, neither the Director nor Feretos were aware or made aware of Jaura's intention to appeal during the appeal period.
20. Fourth, the granting of the extension of time to appeal would unduly prejudice Feretos and the Director, in my view. In the case at hand, Jaura's appeal of the Determination is 43 days past the appeal period and after the commencement of enforcement proceedings by the Director. The Tribunal, in *Re: Tang, supra*, in reviewing the shorter time periods for appealing a Determination under the predecessor to the current Section 112, stated:

"Section 112(2) of the *Act* sets out the time periods for appealing a Determination. A person served with a Determination has only 8 or 15 days to file an appeal depending on the mode of service. In the case of service by registered mail, the time period is 15 days after the date of service; the time period is only 8 days if the Determination is personally served.

These relatively short time limits are consistent with one of the purposes of the *Act*, which is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is in the interest of all parties to have complaints and appeals dealt with promptly."

21. The current provision of the *Act* governing the time periods for appealing a Determination is found in Section 112(3). While the current provision substantially increases the time periods for appealing a Determination (now to 30 days in the cases of service by registered mail or 21 days in the case of personal service), the purpose or intention of the *Act* set out in *Re: Tang, supra*, remain the same, namely,

provision of fair and efficient procedures for resolving disputes and to have complaints and appeals dealt with promptly and in a timely fashion. To allow Jaura to file his appeal 43 days after the expiry of the appeal period would be inconsistent with the purposes of the *Act* as set out in *Re: Tang, supra*, and contrary to the interest of all parties who deserve a prompt and timely resolution. Moreover, in the case at hand, the Director had already commenced the collections process before Jaura filed his late appeal (most likely he was prompted by the collections process). I concur with the Tribunal in *Re: Birla Investments Ltd., BC EST # D022/05*, that the Director would be prejudiced by the granting of an extension when enforcement proceedings have begun.

22. Finally, I am also not persuaded that there is a strong *prima facie* case in Jaura's favour. While the parties have not had an opportunity to respond to the merits of Jaura's appeal, I have reviewed Jaura's written submissions on appeal, and in my opinion, there does not appear to be any basis for an appeal on the ground of failure on the part of the Director to observe the principles of natural justice in making the Determination (or for that matter, the other two grounds not formally pleaded in the Appeal Form). The evidence supports that Jaura had both a sufficient notice of the Complaint and an ample opportunity to respond to it. The delegate first contacted Jaura by telephone, approximately three months before the Determination, on April 2, 2006. The delegate subsequently sent Jaura a letter explaining Feretos' Complaint and the law governing the dispute. This was subsequently followed with the delegate's request to Jaura to provide evidence supporting his position. The delegate also served Jaura with a Demand for Records, which Jaura was not able to comply with. Jaura also conveyed his position to the delegate during the latter's investigation. Accordingly, in my opinion, Jaura was provided a sufficient opportunity to participate in the process and respond to the Complaint during the investigation phase, well in advance of the Determination. Jaura has no real basis to argue that he was denied procedural fairness.

ORDER

23. Pursuant to Section 114(1)(b) of the *Act*, the appeal is dismissed on the basis that a request for an appeal has not been made within the time permitted.
24. Furthermore, pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of \$1,857.23, together with whatever additional interest may have accrued pursuant to Section 88 of the *Act* since the date of issuance. I also confirm the Determination relating to the two administrative penalties of \$500.00 each against Jaura for contravening the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal