

An appeal

- by -

Hollyburn Properties Limited  
("Hollyburn")

- 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:** Carol L. Roberts

**FILE No.:** 2005A/127

**DATE OF DECISION:** September 9, 2005

## DECISION

### SUBMISSIONS

Michael Demers, Jenkins Marzban Logan	on behalf of Hollyburn Properties Ltd.
Ted Mitchell	on behalf of the Director of Employment Standards
Andjelka and Miroslav Ivkovic	on their own behalf

### OVERVIEW

1. This is an appeal by Hollyburn Properties Limited (“Hollyburn”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued June 6, 2005.
2. Andjelka Ivkovic and Miroslav Ivkovic filed complaints against Hollyburn, claiming, among other things, overtime wages and compensation for length of service.
3. The Director’s delegate held a hearing into the Ivkovics’ complaints on February 7, 2005. The following facts are relevant to this appeal.
4. Hollyburn jointly hired the Ivkovics as resident managers of a rental property on April 1, 2004. The employment agreement, which identified the employee as both Andjelka and Miroslav, specified that their combined salary was \$2,600 per month, and that rent in the amount of \$875 per month would not be payable so long as the employment continued.
5. In June, 2004, Andjelka gave Hollyburn two month’s notice that she would be taking pregnancy/parental leave commencing August 19, 2004. She confirmed that she would be willing to continue her work on August 18, 2005. Hollyburn’s senior property manger met with the Ivkovics on or about August 5, 2004, and advised them that since Andjelka would be taking maternity leave on August 19, Miroslav’s employment would be terminated on the same date and they would be expected to vacate their rental unit at the end of the month. The Ivkovics ultimately vacated at the end of October, 2004.
6. The delegate determined that Andjelka was still employed by Hollyburn, albeit on unpaid pregnancy/maternity leave. He also determined that, by requiring the Ivkovics to pay full rental value of the suite after August 31, 2004, Hollyburn had changed a condition of Andjelka’s employment without her consent in contravention of s. 54(2)(b) and 56 (1)(a) of the *Act*. Having found that contravention, the delegate determined that Hollyburn was liable for the full amount of the rent paid by the Ivkovics for the months of September 2004 through August 2005, pursuant to section 79(2) of the *Act*.
7. The delegate also determined that Hollyburn had contravened the *Act* in failing to pay compensation for length of service, overtime wages, statutory holiday pay and annual vacation pay.
8. The delegate ordered that Hollyburn pay the Ivkovics a total of 12,933.50, including interest, and imposed administrative penalties on Hollyburn in the total amount of \$2,000 for the contraventions.

9. Hollyburn's appeal relates only to the amount of compensation awarded for rent. It contends that the delegate erred in law in concluding that the rental value of the suite was not part of Ms. Ivkovic's wages. Alternatively, Hollyburn contends that, if the rental value of the suite was not part of Ms. Ivkovic's wages, the delegate erred in calculating the value of the suite.
10. The Ivkovics have also appealed the Determination.
11. Pursuant to section 112 of the Act, the appeal was to have been filed within 15 days of the date of service (if served by registered mail) or within 8 days of being personally served. Hollyburn's appeal period expired July 14, 2005.
12. Hollyburn's appeal was filed with the Tribunal on July 20, 2005. Hollyburn also seeks an extension of time in which to file.
13. These reasons address only the timeliness of Hollyburn's appeal, and are based on the written submissions of the parties.

## **ISSUE**

14. Whether the Tribunal should exercise its discretion under section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

## **ARGUMENT**

15. Hollyburn submits that there are fundamental legal questions that should be addressed, and that, in any event, the Ivkovics have filed appeals seeking a referral back to the delegate, and that the parties "will be before the Tribunal and/or the Director's delegate in any event".
16. Hollyburn's counsel says that Hollyburn was not aware, and therefore could not appreciate, the fundamental legal issues which the Determination raised "until seeking legal advice on the complainant's appeals". Although there is no evidence as to when Hollyburn received the Determination, it says it received the Ivkovics' appeals on July 18, 2005.
17. Finally, Hollyburn says that it has remitted to the Director the full amount required by the Determination, and that the Ivkovics and the Director are not prejudiced by the late filing of the appeal, given that it is four days late.
18. The Ivkovics submit that the Tribunal should not extend the deadline and allow the late appeal. They say that they filed an appeal within the statutory time frame, and that Hollyburn has not demonstrated good reason why it did not.
19. The delegate contends that Hollyburn is not an unsophisticated party and that it has not suggested that it did not receive the Determination in a timely manner. Further, the delegate submits that, rather than seek immediate legal advice, Hollyburn chose to remit all wages and penalties owing to the Director prior to the expiration of the appeal period. The delegate submits that Hollyburn's explanation that it could not appreciate the fundamental legal issues raised in the Determination is "disingenuous".

20. The delegate also suggests that Hollyburn had no intention of filing an appeal until it received the Ivkovics' appeal:

Hollyburn's request for an extension of the deadline is more likely a visceral reaction to the complainants' decision to appeal, and it serves to undermine the facilitative role of deadlines in the expeditions processing of appeals.

21. In his reply, Hollyburn's counsel submits that the delegate has stepped out of his impartial role of a statutory neutral party, and has become an advocate, contrary to the Tribunal's comments about the proper role of the Director in *D. Hall & Associates Ltd.* (BC EST #D354/99):

...A strict application of the foregoing principles would hold that the Director may not participate as a matter of right in the discussion on the issue of the sufficiency or timeliness of an appeal. It is quite apparent that the issue of timeliness requires no explanation about nor defence of the Determination. It is a procedural issue involving procedures at the level of the Tribunal, not the Branch. Although it is clear that the Director has an ongoing interest in ensuring that there are timely resolutions to employment standard issues, this does not extend as a matter of right to make submissions contrary to the interests of a party on the issue of the sufficiency or timeliness of appeal submissions. However... a panel of the Tribunal may consider it appropriate in a given case to solicit or receive the Director's submission on the point, particularly when the successful party at the Branch level. ...is unable to meaningfully contribute to the matter....

When the Director chooses to make a submission under these circumstances, it will be expected that she will do so as a neutral party, albeit one which may express a position which, if accepted, may favour or dispute the position taken by one of the parties to the proceeding. The Director's role when making submissions on issues which are beyond her right to appear should be akin to that of *amicus curiae* in common law proceedings.

22. Hollyburn's counsel submits that the delegate has made a submission that is both fervent and combative, and goes beyond a measured submission on the merits. For these reasons, counsel submits that the Tribunal should not consider the delegate's submission.
23. Counsel submits that, notwithstanding his position that the Tribunal ought not consider the delegate's submission, it is worthy to note that the delegate did not address the issue of whether Hollyburn had a *prima facie* case.

## ANALYSIS

24. Section 112 of the *Act* provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 15 days of service, if served by registered mail, or 8 days after service, if served personally.
25. These time limits are in keeping with one of the purposes of the *Act*. Section 2(d) provides that one of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
26. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.

27. In *Niemisto* (BC EST #D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those include that the party seeking an extension must satisfy the Tribunal that:
- (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
  - (2) there has been a genuine, ongoing *bona fide* intention to appeal the determination;
  - (3) the respondent party as well as the director has been made aware of this intention;
  - (4) the respondent party will not be unduly prejudiced by the granting of an extension; and
  - (5) there is a strong *prima facie* case in favour of the appellant.
28. These criteria are not exhaustive.
29. I am not persuaded that there is a reasonable and credible explanation for failure to request an appeal within the statutory time limit. The Determination contained all the relevant information on how, when and where to file an appeal. Hollyburn's "failure to appreciate legal consequences" is an insufficient explanation of why the appeal was not filed within the time period provided.
30. There is also no evidence that Hollyburn had a genuine, ongoing intention to file an appeal of the Determination until it was filed. Rather, it appears that the funds were paid to the Director in satisfaction of the Determination, and the merits of the Determination considered only later.
31. Having said this however, I am unable to find that either the Ivkovics or the Director would be inconvenienced or unduly prejudiced if an extension were granted. The appeal was filed four days beyond the statutory deadline, which is not a significant delay. Hollyburn has paid the full amount of the Determination to the Director, and neither the Director nor the Ivkovics will have any difficulty receiving the funds in the event Hollyburn's appeal is unsuccessful. The Ivkovics have filed their own appeal. While it does not necessarily follow that the matter will be "back before the delegate", there will nevertheless be a delay in the payout of the funds.
32. Finally, I find that there is a *prima facie* case in Hollyburn's favour. The delegate awarded Ms. Ivkovic the full amount of rent payable by both Ivkovics. In my view, there is an issue as to whether Ms. Ivkovic was entitled to the full amount of the rent for the period determined by the delegate.
33. Although it is not necessary to dispose of this appeal, I agree with Hollyburn's counsel that the delegate has gone beyond his role as a neutral party in his submissions. His submission contains unnecessarily inflammatory language, and goes beyond addressing the factors that the Tribunal will consider in deciding whether to allow an extension of time. His submission has not assisted the Tribunal in arriving at its decision.

**ORDER**

34. Pursuant to section 109(1)(a) of the *Act*, I allow Hollyburn's application to extend the time for filing an appeal.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**