

An appeal

- by -

Harpal S. Daula a Director of Officer of Pooja Restaurant & Sweets Ltd.,
operating as New Tandoori Garden

(“Daula”)

- 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: Ian Lawson

FILE No.: 2005A/117

DATE OF DECISION: September 21, 2005

DECISION

SUBMISSIONS

Harpal S. Daula	On his own behalf
Mary Walsh	On behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Harpal S. Daula (“Daula”), who is an officer/director of Pooja Restaurant & Sweets Ltd. operating as New Tandoori Garden (“Pooja”), pursuant to section 112 of the *Act*. The appeal is from Determination ER#125-0976 issued by Mary Walsh, a delegate of the Director of Employment Standards, on May 4, 2005. The Determination found Daula personally liable for unpaid wages owing to Surinder Johal (“Johal”) as a result of an earlier Determination issued against Pooja on March 4, 2005, in the amount of \$1,826.92.
2. Daula delivered his appeal to the Tribunal on July 7, 2005, which is 24 days after the appeal period expired. Daula has requested an extension of time to file this appeal, which request is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

3. Johal filed a complaint with the Director, alleging she had been employed by Pooja as a cook between February 1 and 29, 2004. Mary Walsh, a delegate of the Director, investigated the complaint. While the delegate was easily able to interview Johal, no interview or conversation at all took place with anyone representing Pooja. The delegate issued a Determination on March 4, 2005, noting that during the period of her investigation, ownership of Pooja changed (on May 3, 2004). She records that the company name was changed to Tandoori Garden Sweets & Restaurant Ltd., two new directors were listed with the Registrar of Companies in place of Daula and one other director. The delegate records the following:
 1. A mediation notice dated May 18, 2004 was sent by registered mail to 11575-75A Ave., Delta, B.C., which the delegate states is the “then home address” of Daula.
 2. The mediation notice was returned to the delegate on May 25, 2004, marked “moved.”
 3. On June 21, 2004, the scheduled mediation date, a branch officer called the cell phone number 306-0616 and spoke with “Harpal” who said he was not the owner of the business, but who also refused to confirm that he was “Harpal Daula.”
 4. On August 19, 2004, the delegate personally attended at 7757-117th Street, Delta, B.C., which by a Telus Directory search she determined to be the residence of Daula. The delegate spoke with an unidentified woman at the residence, who advised Daula was not present but would return home that evening. The delegate left her business card, and confirmed that the telephone number for that residence was 599-9376.
 5. On September 8, 2004, the delegate phoned 599-9376 and left a message for Daula.

6. On September 14, 2004, the delegate sent a letter to Daula, enclosing a copy of Johal's complaint form, some relevant Employment Standards Factsheets, and a copy of the *Act's* provisions respecting the liability of directors/officers.
 7. On September 21, 2004, the delegate phoned Daula's residence and cell phone. A male person answered the cell phone and advised that Daula was in California and would be returning in one week. She left a message for Daula to call her upon his return, and explained the nature of her call.
 8. The delegate received no communication from Daula.
 9. On January 10, 2005, a Demand for Records was sent to Daula at his home address. The delegate confirmed through Canada Post that the Demand had been delivered, but again received no response.
 10. On February 8, 2005, a "Preliminary Findings" letter was sent to Daula's home address by registered mail, and the delegate confirmed that it had been delivered. The letter invited Daula to respond by February 22, 2005, but no response was received.
4. The delegate concluded her investigation and found Johal to have been Pooja's employee and to be owed wages. The delegate sent the Determination to Pooja's registered and records office, and the appeal period expired on April 18, 2005. Upon finding no appeal was filed and no settlement of the Determination had been made by Pooja, the delegate proceeded to issue the Determination which is the subject of this appeal.

ISSUE

5. Whether the time limit for filing Daula's appeal ought to be extended.

SUBMISSIONS

6. Daula claims the Director failed to observe the principles of natural justice in making the Determination. His written submission contains the following paragraphs:

I am writing this letter to you to explain why I could not respond to Ms. Mary Walsh's letters which I never received because I had moved out of my residence where the mail was coming. Finally the people who live at 7757-117 street got hold of me and gave me all the letters together. I had absolutely no intention to avoid these letters. The simple reason is that I never got these letters until recently.

I was stunned to find the determination by Ms. Walsh in her letter dated May 4, 2005. It is stated in this letter that a person named Ms. Surinder Johl worked in my restaurant in February of 2004. This is an absolute lie. I know this person a little bit because she and her husband came to me during this time enquiring about purchasing my restaurant. She wanted financial statements which I did not have ready at that time. I suggested to her that she can come to the restaurant for a couple of days and see for herself how the restaurant is doing. In the meantime there was another party interested in purchasing my restaurant. Since Mr. And Mrs. Johl could not make up their mind I sold this restauranta to this other party very quickly.

I strongly feel that this lady got upset and made up this whole case of working at my restaurant and not getting paid. I have lots of witnesses who will be happy to back me up. I have their letters too which I will be very happy to provide to you. I worked in this restaurant myself along with my wife. Ms. Johl never worked but barely came for 4 to 5 days to monitor the sales activity.

This is totally unfair the way I have been treated. I would love to meet with you and explain the whole story to you personally.

ANALYSIS

7. The basis upon which this Tribunal will exercise its discretion under s. 109(1)(b) of the *Act* to extend the time for filing an appeal has been well-developed in decisions issued over the past decade. The chief considerations are as follows (as set out in *Re Niemisto*, BCEST #D099/96 and *Re 4 Seasons Electrical Mechanical Contractors of B.C. Ltd.*, BCEST #D471/98):
 1. Whether there is a reasonable and credible explanation for failing to request an appeal within the statutory limit.
 2. Whether there has been an ongoing *bona fide* intention to appeal the determination.
 3. Whether the Director and responding parties have been made aware of this intention.
 4. Whether the responding parties would suffer prejudice if an extension is granted.
 5. Whether there is a strong *prima facie* case in favour of the appellant.
8. In considering Daula's explanation, I find some doubt arises in my mind as to whether it is reasonable and credible that Daula did not intend to avoid Ms. Walsh's letters, and that he did not receive them "until recently." While it could well be true that Daula changed residences three times in less than a year, and while it could have been someone else named "Harpal" the delegate spoke to by phone, and while there could have been some language-based confusion when the delegate attended at 7757-117th Street in person and was told by a woman there that Daula would be back later in the day, I am still left with the impression Daula did not want to have any contact with Ms. Walsh or the Employment Standards Branch. The first Determination was sent in March, 2005 to Pooja's registered office, which is the only correct way to serve the company. Daula was at that time one of two directors/officers of Pooja listed with the Registrar of Companies, and the delegate found he remained so until May, 2005. I do not find it reasonable or credible that after all of the delegate's efforts to contact Daula, and after delivering the Determination correctly to Pooja, Daula was "stunned" to see the second Determination imposing personal liability. If Daula was so neglectful of Pooja's affairs as to ignore the first Determination, and if he changed his residence three times without making any arrangements to forward his mail, then I am not persuaded he was an otherwise diligent director who missed the appeal period on the second Determination through mere inadvertence.
9. One of the documents obtained by the delegate and placed in the record is a land title search for property with the street address "7757-117th Street, Delta, B.C. V4C 6A7." The search was carried out on July 12, 2005, and indicates that "Harpal Singh Daula" is a registered owner in fee simple. As one of the reasons advanced by Daula in support of extension of time is that someone else purchased this home and did not forward his mail until recently, the title search casts further doubt on the reasonableness and credibility of this explanation.
10. I find it doubtful Daula had any continuing intention to appeal the Determination. If the facts he now alleges are true (that Johal was not an employee but merely an interested purchaser of the business), then I would have thought Daula – as one of only two directors/officers of Pooja and the person apparently responsible for the restaurant's daily operations – would have acted swiftly to defend the company from an incorrect Determination. I would also have thought Daula would have nothing to fear from Ms.

Walsh's communications, and he would have eagerly sought out her attention to these important facts. Ten months went by after the delegate attended the residence she reasonably believed was occupied by Daula, and later left messages for him to contact her. It is not believable that Daula only heard about these inquiries "recently".

11. I cannot find that any party was made aware of Daula's intention to appeal. The delegate, in her written submission, advises that her first contact with Daula was on July 4, 2005, after she had sent him a letter dated June 17, 2005 requesting voluntary payment of the Determination. July 4th was already beyond the appeal period.
12. Should an extension of time be granted, the only prejudice that Johal would suffer, in my view, would be a delay in receiving payment of the wages owing to her (and possibly loss of the award completely, should the appeal succeed). While efficiency in resolving employment disputes is one of the *Act's* stated principles, I do not see this delay alone (nor even the possibility of a successful appeal) as constituting prejudice that might justify refusal of an extension of time to file an appeal.
13. As to whether Daula has a strong *prima facie* case, I must agree that if his explanation of Johal's presence in the restaurant is true, then considerable doubt might be cast on the correctness of the Determination. However, that is not what this appeal is about. Pooja filed no appeal from the first Determination. As I have noted, that fact raises doubt in my mind as to whether Daula's explanation might have any grounding in the truth. The appeal which Daula seeks to bring now deals only with the second Determination. Daula has not presented any evidence or argument that could make out a strong *prima facie* case that the Determination was made in error. Indeed, Daula does not deny that he was a director/officer of Pooja at the relevant time, and his submission acknowledges that Johal was present in the restaurant at the relevant time, albeit as a spectator only. I can see no *prima facie* case that the second Determination contains any error, as an application of section 96 of the *Act*.
14. While these five considerations are not the only possible factors in deciding whether to extend time to file an appeal, they are a helpful guide to the exercise of this discretion. I have concluded Daula's explanation is not reasonable or credible, he had no continuing intention to appeal, and there is no *prima facie* merit to the appeal he wishes to bring. For these reasons, I exercise my discretion against granting an extension to file this appeal.

ORDER

15. Pursuant to section 109(1)(b) of the *Act*, Daula's request for an extension of time to file this appeal is denied.

Ian Lawson
Member
Employment Standards Tribunal