

Appeals

- by -

Daniella Investments Inc.,
Louella Kubbernus a Director or Officer of Daniella Investments Inc. operating as
Windisch Food Specialties, and
Daniel Roy Kubbernus a Director or Officer of Daniella Investments Inc.
operating as Windisch Food Specialties

- of Determinations 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/128, 2005A/129 & 2005A/130

DATE OF DECISION: September 28, 2005

DECISION

SUBMISSIONS

Daniel Roy Kubbernus and
Louella Kubberus

On their own behalf and on behalf of Daniella
Investments Inc. operating as Windisch Food Specialties

Lynn Ranger

On behalf of the Director of Employment Standards

OVERVIEW

1. Determination #123-855 was issued against Daniella Investments Inc. operating as Windisch Food Specialties (“Daniella”) on September 22, 2004. The Determination was issued by Lynn Ranger, a delegate of the Director, and required Daniella to pay regular wages, overtime wages, statutory holiday pay, annual vacation pay, compensation for length of service and interest to its former employees Parmvir Birk, Rajdeep Birk, Rajvir Birk, Tersam Birk and Jaswinder Phagura in the total amount of \$11,495.04. An administrative penalty of \$500.00 was imposed for Daniella’s contravention of section 18 of the *Act*.
2. On February 25, 2005, upon finding the Determination had not been paid by Daniella and that Daniel Roy Kubbernus and Louella Kubberus (“the Kubbernuses”) were directors or officers of Daniella at the time the wages and other amounts became payable, two further Determinations were issued which imposed personal liability on each of the Kubbernuses for the amount owing.
3. On July 12, 2005, the Kubbernuses delivered an appeal from these Determinations to the Tribunal pursuant to section 112 of the *Act*. As the appeal was delivered more than eight months after the expiry of the appeal period on the first Determination, and more than three months after expiry of the appeal period on the personal liability Determinations, the Kubbernuses have requested an extension of time to file their appeal. Their request for an extension of time is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

4. The delegate states the following in the second Determinations issued on February 25, 2005, which imposed personal liability on the Kubbernuses:

The Determination [the first, issued on September 22, 2004] was sent to Daniella Investments Inc. Operating as Windisch Food Specialties, with copies to the Registered and Records Office, and to the Directors and Officers. The appeal period on the Determination expired on November 1, 2004.

To date, no appeal has been received and no settlement of the Determination has been made by Daniella Investments Inc. Operating as Windisch Food Specialties...

The BC On-Line: Registrar of Companies – “Corporation Search”, indicates as at April 27, 2004, Daniella Investments Inc. Operating as Windisch Food Specialties was incorporated on July 17, 1987. Louella Kubbernus... [and Daniel Roy Kubbernus were] listed as a Director/Officer.

Jaswinder Phagura, Parmvir Birk, Rajdeep Birk, Rajvir Birk, Tersam Birk's unpaid wages were earned between March 30, 2003 and August 26, 2003. Louella Kubbernus... [and Daniel Roy Kubbernus were] a Director/Officer of Daniella Investments Inc. Operating as Windisch Food Specialties, and [were] so appointed at the time the complainant's wages were earned and payable.

ISSUE

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

SUBMISSIONS

6. Louella Kubbernus states the following in her submission:

My husband and I were forced to close our family business in August of 2003 when our client was unable to honor the terms of their contract to us. The landlord seized the premises, as we were unable to make the lease payments. We were not able to make payroll and numerous other expenses. We suffered great personal losses such as our family home of 18 years, our vehicles and other possessions. The losses were great and at the time we had spoken to Lynn Ranger who had been contacted by the employees. We were dealing with a great deal of stress. There were no funds available to make the payroll. We were having discussions with her up until early 2004 and then she did not call us again and we did not pursue the matter any further as we were dealing with a great many issues surrounding the closure of the business. I don't mention these details for sympathy but to emphasize that we were not able to make any payments at all to anyone at the time.

We had no knowledge of the Determination, until we tried to raise money at our bank in June of 2005 and they discovered the Writ on my credit history. They would not continue with the loan until the amount against my name was cleared.

My husband phoned Lynn Ranger, the Delegate of the Director of Employment Standards and she said that the registered mail that she had sent us was returned to her so she had no choice but to make the determination....

7. The Director's delegate makes the following submission:

I have reviewed the employer's letter attached to the appeal form. With respect to the issue of denial of natural justice, the employer and I have corresponded by mail and phones as noted above [the delegate sets out a chronology of contacts]. The employer was well aware of the investigation. Both directors signed for registered mail which enclosed an outline of the investigation and for the Demand for Records. It was this letter that prompted his call to the Employment Standards Branch. He stated he wished to participate and was to send in payroll records on a mutually agreed date however no documents were received.

The employer also failed to keep me apprised of his change of address. He reluctantly disclosed his new post office box number, but only once I asked. However, when I sent the determination to the post office box it was returned BOX CLOSED.

I had graciously given the employer four months to produce payroll records, which I find more than ample [*sic*] time to produce documents he claimed he had. Finally after seven months of dialogue, with no documents produced, I proceeded to write the determination. As this

information was available and known to the employer at the time of the investigation it is not a denial of natural justice and as such cannot be used to re-argue the case.

8. The Kubbernuses, in their reply submission, do not take issue with the delegate's submission that Daniel Kubbernus had expressed an interest in "participating" in the investigation, had given the delegate a false or misleading post office box number, and had failed to produce any employment records despite telling the delegate he would.

ANALYSIS

9. 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.
10. The explanation offered by the Kubbernuses is that they did not receive the first Determination, and so did not know of their potential liability as directors/officers of the company. They acknowledge having correspondence and telephone calls with the delegate after the investigation commenced, and they do not dispute giving a postal address to the delegate which was incorrect. As the delegate notes in the second Determinations, the first Determination was delivered to the company's registered and records office, which is the only way a company may be served. The delegate also mailed the first Determination to the postal box which Daniel Kubbernus had given her. The second Determinations were mailed to the registered and records office, and also to the postal box.
11. In my view, a diligent and responsible director/officer of a company would act on a Determination delivered to the company by the Director, particularly if they thought the Determination was made in error. The same diligent and responsible director/officer would note the warning contained in the Determination issued against the company, that if it is not satisfied, personal liability may be imposed on the company's directors/officers. If the director/officer changed addresses, arrangements would be made to ensure no important mail was missed. If the director/officer knew that a delegate of the Director had been appointed to investigate a complaint of unpaid wages from five of the company's former employees, that director/officer would take care to ensure the delegate was apprised of all important facts, and would not try to evade the investigation. No prudent director/officer would assume the investigation would "go away" if it was ignored.
12. When I compare the Kubbernuses's conduct with what I think any reasonable and prudent director/officer would do in the same circumstances, I find they had such disregard for the company's affairs that their

explanation for the delay in filing an appeal is not reasonable or credible. I conclude, instead, that having lost their business and personal assets, they were intent on avoiding any further liability for their company's debts, particularly where they knew they faced personal liability under section 96 of the *Act*. I conclude their dealings with the delegate were aimed at thwarting her investigation and enabling them to argue later that they had no knowledge of the Determinations.

13. For the same reasons, I find it doubtful the Kubernuses had any continuing intention to appeal the Determinations. In my view, their intention was actually to avoid the investigation and hide from inevitable personal liability for their employees' unpaid wages.
14. I cannot find that any party was made aware of the Kubernuses' intention to appeal. To the contrary, I find they tried to prevent the delegate from contacting them.
15. Should an extension of time be granted, the only prejudice that the five employees would suffer, in my view, would be a delay in receiving payment of the wages owing to them (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.
16. Even if I am wrong about the Kubernuses' intentions and their explanation is in fact reasonable and credible, they have not raised any fact or argument that might cast doubt on the correctness or fairness of the Determinations. The Kubernuses acknowledge wages are owing to the company's former employees. They do not deny their role as directors/officers of the company when the wages were earned and payable. I do not see any argument they could make that might support even a *prima facie* case on appeal. This factor alone requires that I exercise my discretion against granting an extension to file this appeal.

ORDER

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

Ian Lawson
Member
Employment Standards Tribunal