

An appeal

- by -

Hundial Holding Ltd. operating as Evergreen Pub  
(“Hundial”)

- 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

**ADJUDICATOR:** Norma Edelman

**FILE No.:** 2002/198

**DATE OF DECISION:** June 10, 2002

## DECISION

### OVERVIEW

This is an appeal by Hundial Holding Ltd. operating as Evergreen Pub ("Hundial") pursuant to the Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination issued by a delegate of the Director of Employment Standards on February 28, 2002. The delegate found that Hundial owed Barry Johnson ("Johnson") \$373.44 representing compensation for length of service. The Determination indicated an appeal of it had to be delivered to the Tribunal by March 25, 2002. The Tribunal received an appeal on April 9, 2002. Hundial requested that the Tribunal extend the deadline to file an appeal. This appeal was decided based on the written submissions received from Hundial and the delegate.

### ISSUE TO BE DECIDED

Should the Tribunal exercise its discretion under Section 109(1)(b) of the *Act* to extend the deadline for filing an appeal?

### FACTS

On February 28, 2002 the delegate issued a Determination which found that Hundial dismissed Johnson without just cause or notice and therefore it owed him compensation for length of service in the amount of \$373.44 including interest. The delegate said Jack Hundial told him during a meeting that Johnson's dismissal was related to attendance and that he would provide written details regarding the matter. However, despite a follow-up letter and phone call, as well as a discussion with the company's sole officer and director, no submission was ever received from the employer. Accordingly, the delegate accepted Johnson's claim that he was owed compensation for length of service.

The Determination indicated that an appeal of it had to be received by the Tribunal no later than March 25, 2002.

On March 8, 2002 the Tribunal received an appeal from Hundial. The material included reasons but a copy of the Determination was not attached despite instructions on the Appeal Form to do so. On March 22, 2002 the Tribunal Administrator faxed a letter to Hundial, with a copy to the delegate, advising it to send the Determination to the Tribunal by March 28, 2002 or the file would be closed. The Tribunal Administrator advised Hundial that since it had not provided the Determination, the Tribunal did not know the appeal deadline and that if the appeal was not perfected by the end of the appeal deadline the Tribunal would first consider the timeliness of the appeal before considering the merits of the appeal. Hundial replied by fax on the same day with a copy of what appeared to be page 2 and 3 of the Determination. As a result, the Tribunal Administrator faxed another letter dated March 22, 2002 to Hundial, with a copy to the delegate, stating: "To perfect your appeal you must provide us with the entire Determination that you wish to appeal, not just part of it, including any and all attachments that may have accompanied the Determination. The statements contained in my letter of earlier today still apply." No reply was received from Hundial by the deadline of March 28, 2002. Consequently, the Tribunal sent a letter to Hundial dated April 5, 2002, with a copy to the delegate, stating that as the Tribunal had not received the documents as requested, it was unable to proceed with the appeal and the file was closed.

On April 9, 2002 the Tribunal received a new Appeal Form from Hundial, with a copy of the reasons that had been submitted on March 8, along with a copy of the entire Determination and a cover letter, which stated:

Regarding our conversation from earlier today, I am requesting that a new Appeal of Determination be considered, as I was unable to supply you with all of the proper documentation previously. Your previous file number on this matter is 2002-117, which I believe is now closed. It would contain the bulk of the material you require. The reason I would like this appeal heard is:

- I missed the time deadline of March 25, 2002 because I thought I had faxed you all of the pages of the Determination. I understand now that you only received 2 of the 3 pages. Further, when I re-fax you page 2, I mistakenly did not send you the deadline for appeal portion.
- It had been, and still is my intention, to appeal this Determination regarding Barry Johnson, based on the material previously submitted, and also enclosed with this package.
- The deadline for the appeal was March 25, 2002. It is now 14 days after that deadline. I feel that it is unreasonable to close the entire appeal process down, for only 1 or 2 pages, when your office had previously accepted the bulk of the appeal. The original appeal was filed before the appeal deadline, and for a matter that is this important, I do not think a further 2-week delay will cause a significant hardship to anyone, since the amount requested by Mr. Dafoe does not have to be paid until April 15, 2002.

I explained my frustration to you over the phone regarding the use of faxes and e-mail for communicating. As the closest office for me to appeal this matter to is in Vancouver, and I live in Terrace, I hope that you will consider this in allowing me to Appeal this Determination.

I left a message with Mr. Dafoe, outlining our conversation and this letter.

(reproduced as written)

Mr. Dafoe is the delegate who issued the Determination. Hundial's reference to "the amount requested by Mr. Dafoe does not have to be paid until April 15, 2002" concerns a letter sent by the delegate to Hundial dated April 4, 2002 which states he was advised by the Tribunal that Hundial had not filed a proper appeal and as the deadline to appeal was passed, the Determination was due and payable. The delegate asked Hundial to forward a cheque to him by April 15, 2002.

In its reasons for the appeal, Hundial says Johnson gave the company 2 weeks notice he was quitting on August 28. However, he failed to report to work on his last 3 scheduled days. Hundial further says it sent a fax to the delegate, after his meeting with Jack Hundial, requesting more particulars regarding Johnson's complaint, but apparently it was not received. Hundial indicated it wants the Determination cancelled or referred back for further investigation.

The other parties on the appeal were invited to make submissions on a possible extension of the deadline for filing an appeal under Section 109 (1)(b) of the *Act*. Only the delegate replied and it is his position that the appeal should not be accepted.

The delegate says there is no good reason why Hundial could not meet the appeal deadline. He said he sent Hundial another copy of the Determination, as per its request, on March 22, 2002. Subsequently, he

received a copy of a letter from the Tribunal to Hundial advising that an incomplete copy of the Determination had been received and the appeal was not yet perfected. On April 4, 2002 he advised Hundial the Determination was due and payable and on April 5, 2002, the Tribunal advised Hundial it had closed the file. Finally on April 9, 2002, the appeal was submitted in a proper form. The delegate says Hundial failed to make either the March 25 or the March 28 deadline and in the end the delay was 15 days. The delegate further says he believes Hundial always intended to appeal the Determination and he was aware of this intent, but he cannot speak for Johnson. He believes extending the deadline would not harm Johnson's case. Finally, he says Hundial does not have a strong case. The onus is on the employer to demonstrate cause for dismissal and Hundial was given ample opportunity to make its case during the investigation. He says it failed to provide any evidence to support a finding of just cause and it should not now be allowed to introduce evidence, which was available during the investigation, and which it failed to provide at that time and that further without the production of evidence proving cause it cannot make its case.

Hundial and Johnson were invited to reply to the delegate's submission. The Tribunal received no replies.

## ANALYSIS

Section 109(1)(b) of the *Act* provides the Tribunal with the discretion to extend the time limit for an appeal. Hundial has effectively requested that the Tribunal extend the deadline to file an appeal.

The Tribunal has held consistently that it should not grant extensions under Section 109(1)(b) as a matter of course and it should exercise its discretionary powers only where there are compelling reasons to do so. (See, for example, *Metty M. Tang* BCEST #D 211/96). In deciding whether "compelling" reasons exist in a particular request for an extension, the Tribunal has identified several material considerations including:

- i. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- ii. there has been a genuine and ongoing bona fide intention to appeal the Determination;
- iii. the respondent party (i.e. the employer or the employee) as well as the Director of Employment Standards, must be aware of this intention;
- iv. the respondent party will not be unduly prejudiced by the granting of the extension; and
- v. there is a strong prima facie case in favour of the appellant.

I have considered the above criteria and I have decided to extend the appeal deadline in his case.

Hundial filed an Appeal Form, with reasons, and pages 2 and 3 of the Determination within the appeal time limit. These documents clearly set out the nature of the issues and the Appellant's position on them. In my view, the requirements for filing an appeal, as set out in the *Act* and the Tribunal's Rules, were sufficiently met by Hundial when it filed these documents on March 8, 2002. In other words, Hundial did not fail to submit a sufficient appeal by the appeal deadline.

There is no question that Hundial always intended to appeal the Determination and did so well before he appeal deadline. Although, Johnson was not advised of the appeal until April 9, 2002, the Tribunal and the delegate were advised of the appeal before the appeal deadline.

There is no evidence before me to show that the delay in this matter will have an adverse impact on Johnson.

Finally, although I am left with some doubt about whether Hundial would be successful in its appeal, particularly with regard to the issue of whether it failed to participate in the investigation, I cannot say the appeal is frivolous.

In balancing the factors considered above, I believe any apparent weakness of the merits of the appeal is outweighed by the fact that the appeal was sufficiently filed within the appeal deadline, the delegate and the Tribunal were aware of the appeal before the deadline and there is no evidence of an adverse impact on Johnson. Accordingly, Hundial should be granted the extension requested.

## **ORDER**

The deadline for an appeal of the Determination is extended to April 9, 2002 and the appeal may proceed to a consideration of its merits.

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**Norma Edelman**  
**Vice-Chair**  
**Employment Standards Tribunal**