

An appeal

- by -

Oak Forever Furniture Co. Ltd. (appeal by Armandeep and Surinder Bath)
("Oak Forever")

- 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: Ib S. Petersen

FILE No.: 2001/323

DATE OF DECISION: July 5, 2001

DECISION

SUBMISSIONS:

Mr. John Frank	on behalf of the Employer
Mr. Kulwant Singh Virk	on behalf of himself
Ms. Lynne Fanthorpe	on behalf of the Director

OVERVIEW

This is an application for extension of time under Section 109(1)(b) of the *Employment Standards Act* (the “Act”) in respect of an appeal by Oak Forever pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on March 16, 2001 which determined that Oak Forever was the employer of Kulwant Singh Virk, Baljinder Khangura and Harjit Singh (the “Employees”) and that they were owed \$34,154.30 on account of, among others, overtime wages, vacation pay and statutory holiday pay.

Oak Forever appeals the Determination. The nub of its appeal is that it is not the Employer. In a letter to the Tribunal, Counsel for Oak Forever explains that it ceased operations in 1998 and leased the assets of the business to a Mehar Khangura, or a numbered company, and that he continued to operate the business under the name Oak Forever Furniture, a name similar to the corporate appellants. The Employees were employed in various capacities between 1999 and 2000. I understand that the operations of the business came to an end in 2000.

FACTS AND ANALYSIS

The Employer’s appeal was filed by letter dated April 24, 2001, well after the April 9, 2001 deadline. The principals behind Oak Forever received the Determination on April 11, 2001 when it was forwarded from its registered office. The same day, one of the principals, Surinder Bath, attended the office of the Employment Standards Branch and explained his position, which, I assume, is consistent with the above, namely that Oak Forever is not the employer of the Employees. He then left for India, having caused the Determination and attached materials to be forwarded to his counsel with instructions to appeal. Counsel explains that he was unable to file until he had received the proper instructions from Bath upon his return on April 23, 2001. The appeal was then filed.

In *Blue World It Consulting Inc.* (BCEST #D516/98), the Adjudicator summarized the considerations applicable to a request for an extension of the appeal period:

- “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 and ongoing *bona fide* intention to appeal the Determination;
- 3) the respondent party (*i.e.*, the employer or the employee) as well as the Director of Employment Standards, must have been made aware of this intention;
- 4) the respondent party will not be unduly prejudiced by the granting of the extension; and
- 5) there is a strong *prima facie* case in favour of the appellant.”

The delegate and one of the respondents oppose the request for an extension of time. The delegate says, among others, that the Employer could have filed the appeal as soon as it was received, on April 11 and, in any event, that the information provided in the appeal is “new information” that could have been provided by Bath in the ongoing investigation that spanned from July 2000 until the Determination was issued on March 16, 2001. In short, there is no strong *prima facie* case in favour of Oak Forever.

Virk writes, in a submission to the Tribunal, that his complaint was against Mehar Khangura and “... I must indicate that have no dealings with Armandeep and Surinder Bath, since Mehar Khangura was my employer. Mr. Khangura is the individual I have filed a complaint against, he owes me money.” All the same, he opposes the request for an extension of time.

Counsel for Oak Forever argues that Bath did not receive the Determination until after the appeal period had passed. He says that Bath immediately took steps to appeal the Determination and that it was, in fact, filed only some 13 days late. Counsel also argues that Bath upon receipt of a Demand for Employer Records from the delegate advised the delegate to contact Mehar Khangura. There is no dispute with respect to this aspect. According to the Determination, Bath returned the Demand to the delegate with a note stating: “This does not belong to us. They were leasing from us. Please contact M. Khangura.” Counsel argues that there is no prejudice against other parties and that they were aware that Oak Forever was not the Employer.

In the circumstances, I am prepared to grant the extension. In my view, the Employer’s application meets the criteria discussed in *Blue World*. I accept that there is a reasonable and credible explanation for the failure to appeal in time. It is clear from the correspondence that the appellant Employer had a *bona fide* intention to appeal and that it advised the delegate of that intention upon receipt of the Determination. I am not satisfied that there is any undue prejudice to the respondents arising from this short delay. Moreover, and in particular, I am of the view, that there is a strong *prima facie* case in favour of the appellant Employer. In that regard, I am particularly persuaded by the comments of the respondent Virk who states that from his

perspective Mehar Khangura appeared to be the employer. Also there is little analysis of the “true employer” issue in the determination. I wish to make it abundantly clear that I do not decide the issue of the identity of the employer. It appears from the correspondence that the delegate is also proceeding against Mehar Khangura (or other parties) as the employer. In the process dealing with the merits of this case there may be, as well, an issue arising from the delegate’s argument that Oak Forever failed to participate in the delegate’s investigation. As the issue before me is only whether or not there is a strong *prima facie* case, I need not deal with that aspect at great length. Oak Forever says that it directed the delegate to the person to whom the business assets were leased. Again, I wish to make clear that I do not decide whether or not Oak Forever failed to participate in the delegate’s investigation.

In brief, in the circumstances, I am prepared to exercise my discretion to extend the time for filing the appeal.

ORDER

The application to extend time to file an appeal of the Determination dated March 16, 2001 is granted.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal