

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Charanjiv Parmar Operating Grizzly Inn Restaurant
(“ Parmar ”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

ADJUDICATOR: David B. Stevenson

FILE NO.: 2000/569

DATE OF DECISION: November 6, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Charanjiv Parmar Operating Grizzly Inn Restaurant (“Parmar”) of a Determination which was issued on July 18, 2000 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Parmar had contravened Part 3, Section 18 and Part 4, Section 40 of the *Act* in respect of the employment of three former employees of Parmar, ordered Parmar to cease contravening and to comply with the *Act* and to pay an amount of \$2,524.34. Parmar says the Determination is wrong because the Director accepted the information provided by the complainants over the payroll records of Parmar. Before considering whether there is any substance to the appeal, a preliminary issue has been raised concerning the timeliness of the appeal.

ISSUE

There are two issues raised by this appeal. The first is whether the Tribunal should extend the time limit for filing this appeal. If the Tribunal does extend the time limit, the second issue is whether Parmar has shown the Determination was wrong.

FACTS

The following findings of fact were made in the Determination on the substance of the complaint:

An employee is entitled to compensation for all hours worked, as per the Employment Standards Act. An employer must also compensate the employee for daily hours worked beyond eight hours per day and weekly hours beyond forty hours per week. An employee with less than five consecutive years of employment is entitled to at least, 4% of their total earnings for vacation pay.

As a result of my investigation it has been determined that the employer employed the above complainants and the employer did not pay the Complainants for all hours worked including, overtime and vacation pay. On the balance of probabilities the employer’s records do not prove to be credible and therefore for the purpose of the determination the calculations will be based on the employee’s records.

On the balance of probabilities I prefer the evidence submitted by the employees.

The Determination was issued on July 18, 2000. The appeal was not filed until August 18, 2000. The Determination clearly notes the right of any person served with the Determination to appeal it and that the appeal was required to be delivered to the Tribunal no later than 4:30 PM on August 14, 2000. Upon receipt of the appeal, the Tribunal notified Parmar of its intention to

consider whether to exercise its discretion under Section 109(1)(b) of the *Act* and allow the appeal even though the period of time for filing the appeal had expired and sought submissions. On September 5, 2000, a submission was filed on behalf of Parmar, which acknowledged the delay, but said there was an explanation for it:

[The delegate] was contacted, by phone, August 10/00 and informed of the decision made by our client, Mr. Parmar, to appeal the determination made. She stated she would fax the Appeal Forms required for this process. We did not receive these forms until August 14/00 @ 2:21 p.m. You will find a copy of the fax received by our office enclosed with this letter. As you are aware, the deadline for the appeal was also August 14/00. We were clearly not given enough time to prepare our case; not to mention the time to have our appeal delivered to the Tribunal.

In reply, the Director noted that the Determination was delivered by registered mail to the business address of Parmar on July 24, 2000 and wonders why no steps were taken by Parmar to appeal until August 14, three weeks after receipt of the Determination at the place of business.

In response, the representative for Parmar says:

In regards to the time delays in receiving the information, Determinations, etc., Mr. Parmar's place of business is in Bear Lake, BC, and his representative, Guerreiro and Associates, is in Mackenzie, BC. This, unfortunately, makes it difficult to exchange information in a timely way.

ANALYSIS

The Tribunal has consistently stated that an appellant has an obligation to exercise reasonable diligence in the pursuit of an appeal and the Tribunal will not exercise its discretion under Section 109(1)(b) of the *Act* in favour of an appellant who has failed, without any good reason, to do so.

Parmar has not exercised reasonable diligence in the pursuit of this appeal and has not provided a good reason for failing to do so. I do not accept that the "difficulty, as expressed by the representative for Parmar, in exchanging information between Parmar and his representative in a timely way is a good reason for failing to do anything in respect of an appeal of the Determination from July 24, 2000 until August 10, 2000, when the representative contacted the delegate to request the appeal forms. It is apparent that the representative for Parmar was involved in the investigation of the complaint. They provided records to the Director and were aware of the areas of dispute and the areas of conflict between those records and the information provided by the complainants. The appeal revisits those same areas of dispute and disagreement and the information upon which the appeal is based comes from the office of Parmar's representative.

I note that the delay in filing the appeal was only four days. This is a factor that the Tribunal will consider when called upon to exercise its discretion. It is an aspect of diligence and its significance is assessed in the context of all the circumstances. For the reasons that follow, it has been given no weight.

While the Tribunal does not consider the merits of an appeal in the context of a question arising under Section 109(1)(d), an initial assessment of the grounds for appeal is also a factor in our consideration. In this case, the appeal challenges the decision to accept the information provided

by the complainants over the records provided by Parmar on the issue of the hours worked by the complainants. It is not the role of the Tribunal in an appeal to reassess the information provided by the respective parties or to second guess the decision of the investigating officer to accept the information given by one party over that of another. The burden on Parmar is to show either that the decision was manifestly unfair or that there was rational basis upon which the conclusions of fact relevant to the decision could be made. This appeal does little more than assert that the records provided by Parmar should have been preferred over the records kept by the complainants. The weakness of the appeal militates against exercising our discretion under Section 109(1)(b) in favour of allowing this appeal.

ORDER

I decline to exercise my discretion under Section 109 of the *Act* and, pursuant to Section 115 of the *Act*, I order the Determination dated July 18, 2000 be confirmed.

David B. Stevenson

David B. Stevenson
Adjudicator
Employment Standards Tribunal