

An appeal

- by -

Andrew McKee
("Employer")

- 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: Sheldon M. Seigel

FILE No.: 2009A/140

DATE OF DECISION: January 5, 2010

DECISION

SUBMISSIONS

Andrew McKee	on his own behalf
Kathleen Demic	on behalf of the Director of Employment Standards

OVERVIEW

1. Mr. McKee appeals a determination (the “Determination”) of the Director of Employment Standards (the “Director”), pursuant to section 112 of the *Employment Standards Act* (the “Act”).
2. The delegate of the Director found in the Determination that the Employer had contravened sections 18 (wages) and 58 (vacation pay) of the *Act* with respect to the employment of James Bailey (“Mr. Bailey”). The Director also found that accrued interest under section 88 of the *Act* was owing to Mr. Bailey, and that the total wages payable to Mr. Bailey was \$524.05.
3. The Director also imposed an administrative penalty of \$500.00 on the Employer for breaching the *Act*. The total amount payable by the Employer was \$1,024.05 inclusive of the administrative penalty.
4. Mr. McKee is a roofing contractor. Mr. Bailey filed a complaint for unpaid wages with the Employment Standards Branch on the basis that he was an employee of Mr. McKee. The Director found that Mr. Bailey worked as an employee for Mr. McKee for a short period of time in 2009 and was not paid his wages and vacation pay accrued.
5. The Delegate conducted an investigation into the complaint and issued a Determination on August 5, 2009. With respect to appeal timelines, the Determination indicated the following:

Should you wish to appeal this Determination to the Employment Standards Tribunal, your appeal must be delivered to the Tribunal by 4:30 on September 11, 2009.
6. On October 21, 2009, the Employment Standards Tribunal (the “Tribunal”) received an appeal form from Mr. McKee, appealing the Determination. The appeal sought that the Determination be cancelled. Attached to the appeal is a one-page letter from Mr. McKee describing his reasons for the late appeal and a three-page letter describing the reasons for the appeal.
7. By letter dated October 26, 2009, the Tribunal invited Mr. Bailey and the Director to respond to the Employer’s late appeal. Mr. Bailey did not respond. The Director (represented by the Delegate) forwarded her submissions.

ISSUES

8. Should the Tribunal exercise its discretion under section 109(1)(b) of the *Act* to extend the appeal period in this case? The section provides:

109(1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:

(b) extend the time period for requesting an appeal even though the period has expired [.]

ARGUMENT AND ANALYSIS

9. The Tribunal has often considered issues involving late appeals. The decisions typically turn on similar matters of non-payment of employee wages and other payments.
10. A non-exhaustive test has been established through jurisprudence. The test has been quoted as follows:

In deciding whether to exercise my discretion to extend the appeal period under section 109(1)(b), I must be satisfied that all of the following apply:

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

See Niemesto, BC EST # D099/96.

11. The Tribunal will not grant an extension as a matter of course and will do so only where there are compelling reasons. The burden is on the appellant to show that the time period for an appeal should be extended. (*Moen & Sagh Contracting Ltd.*, BC EST # D298/96)
12. The Determination indicates the deadline for appeal is September 11, 2009. Mr. McKee's appeal was filed on October 21, 2009, approximately 40 days later. By way of explanation, Mr. McKee says:

...I had not got any calls, notices, or letters in the mail. By the time I got a letter I was already late filing the appeal...

and

...I had talked to someone from the Employment Standards Branch several months ago when all this started...I got no calls, letter, no messages on my phone. I then got the determination all of a sudden.
13. The remainder of the argument presented by Mr. McKee in his appeal and attached correspondence is a re-telling of his version of the substantive facts on which the Determination was based.
14. The Delegate opposes the granting of time to extend the appeal period.
15. The Delegate provides a list of contact dates and attempted contact made with Mr. McKee and supports her list with evidence in the Branch record attached with her submissions. A review of that record confirms the following:

- May 12, 2009: The Employment Standards Branch contacted Mr. McKee and advised him of the nature of the claim filed. The Branch notes confirm that Mr. McKee disputed the claim and provided his view of the facts.
- May 13, 2009: In a second telephone call, Mr. McKee argued that he was an employee of the complainant.
- May 21, 2009: The Delegate attempted to contact Mr. McKee by telephone. Mr. McKee was not available and a message was left with Mr. McKee's spouse, Melissa.

- June 3, 2009: The Delegate spoke to Mr. McKee's spouse again by telephone. The spouse advised that she had information about the relevant fact situation and provided information about Mr. McKee's position.
- June 3, 2009: The Delegate spoke with Mr. McKee on the telephone. She advised as to the facts she obtained to that point in the investigation. Mr. McKee abruptly terminated the phone call.
- June 19, 2009: The Delegate sent a package by registered mail to Mr. McKee at the address on file. This package included the following:
 - A copy of the complaint
 - A copy of the evidence submitted by the complainant
 - An information package outlining pertinent sections of the Act
 - The Delegate's preliminary findings

Canada Post confirms that this package was successfully delivered and that Mr. McKee signed for it.

- July 3, 2009: Mr. McKee sent a letter to the Employment Standards Branch in response to the preliminary findings. He provided evidence in support of his position.
 - August 5, 2009: A determination was sent by both registered and regular mail to the address on file for Mr. McKee. The registered mail was returned marked "unclaimed." A Canada Post search shows that delivery was attempted on August 6, 2009. The file indicates that Canada Post left a notice card for Mr. McKee indicating where to pick up the package. The determination was also sent via regular mail to the same address. The regular mail was not returned to the post office.
 - September 16, 2009: The Branch sent a collection letter to Mr. McKee regarding collections.
 - September 22, 2009: Mr. McKee contacted the Branch to argue that he did not receive the determination. The Branch confirmed Mr. McKee's mailing address with him on the telephone and sent another copy of the decision by registered mail and one by regular mail to that address. The address provided by Mr. McKee was the same as the one on file and to which the previous copies of the determination were sent.
 - September 23, 2009: Mr. McKee confirmed receipt of the determination by telephone.
 - October 1, 2009: Mr. McKee contacted the Employment Standards Tribunal to discuss an appeal of the decision.
16. Mr. McKee argues that he was denied natural justice because he was not provided with information or evidence that led to the Determination. I find that the record suggests otherwise. Mr. McKee responded to the preliminary findings letter and on at least two occasions replied to the evidence available to the Director and explained his version of the facts.
17. Mr. McKee argues that he was not aware that a Determination had been issued pursuant to an investigation and was not expecting receipt of the Determination. I find the record shows that Mr. McKee was notified that an investigation was in progress and had communication with the Branch at relevant times.

18. The Tribunal has consistently held that extensions to the time limits for filing an appeal will not be granted under Section 109 of the *Act* as a matter of course and that such discretion is only exercised when the appellant has provided compelling reasons to do so. The Tribunal in *Metty M. Tang*, BC EST # D211/96, commented on the appeal time limits by noting that they are:
- ... consistent with one of the purposes of the *Act* which is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is in the interest of all parties to have complaints and appeals dealt with promptly.
19. The Determination was sent to Mr. McKee's address. Mr. McKee confirmed that the address was the same as that noted in the Branch records. Although he did not pick up the Determination sent by registered mail and returned to the post office, a copy of the Determination was sent by regular mail to the same address and was not returned. I find on the balance of probabilities that Mr. McKee did see the Determination in a timely fashion and before the appeal deadline. I find that in the alternative, Mr. McKee actively avoided notification of the Determination and therefore should not be successful in seeking relief from the appeal deadline.
20. Even when Mr. McKee was provided with a third copy of the Determination, one that he acknowledges receiving on September 23, 2009, twelve days after the deadline for the appeal, he did not submit his request for an extension for approximately four weeks. I find this delay speaks to the appellant's lack of interest in providing a timely appeal to the Determination.
21. I find that Mr. McKee was aware of the investigation, knew the nature of the evidence before the Director, had notice of her preliminary and ultimate conclusions, and was provided with all of the relevant evidence and information in a timely fashion. I find further that Mr. McKee received notice of the Determination with ample time to file an appeal within the time allowed, or that he actively avoided such notice.
22. I find Mr. McKee has not provided a reasonable and credible explanation for the failure to request an appeal within the statutory time limit. Further, the content of his submissions is far from indicative of a *prima facie* case in his favour. Rather, I find it a re-telling of the primary facts on which the Determination was made.
23. The Employer has not met its burden of showing that the time limit for appeals should be extended in this case. I decline to exercise my discretion to extend the appeal period.

ORDER

24. Pursuant to section 109(1)(b) of the *Act*, I deny the application to extend the appeal period.

Sheldon M. Seigel
Member
Employment Standards Tribunal