

An appeal

- by -

Alexander Daniel
(“Mr. Daniel”)

- 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: Robert C.P. Walker

FILE No.: 2011A/168

DATE OF DECISION: January 25, 2012

DECISION

SUBMISSIONS

Alexander Daniel on his own behalf

Sharn Kaila on behalf of the Director of Employment Standards

OVERVIEW

1. Alexander Daniel (“Mr. Daniel”) appeals pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) against a Determination of the Director of Employment Standards issued May 3, 2011.
2. Mr. Daniel’s appeal was filed with the Tribunal on November 4, 2011. Pursuant to section 112 of the *Act* the appeal should have been filed within 15 days after the date of service (if served by registered mail) or within 8 days of being served personally served.
3. A Determination dated May 3, 2011, was sent by registered mail to “Alexander Daniels”. It was ultimately returned unclaimed. Mr. Daniel’s appeal period expired June 10, 2011. Therefore, Mr. Daniel seeks to extend the time period for requesting an appeal under section 109(1)(b) of the *Act*.
4. Mr. Daniel’s employee, Jamie Bishop (“Mr. Bishop”) worked as a siding installer for 3 days commencing November 30, 2010, and ending December 2, 2010. Total hours worked were 21 hours when his employment terminated. The Director determined he was entitled to compensation in the amount of \$315 plus accrued interest for 21 hours pay at \$15 per hour. Mr. Daniel was also assessed a \$500 penalty under section 18 of the *Act* for failure to pay wages to an employee within the time provided upon termination.
5. Mr. Daniel had given Mr. Bishop a post-dated cheque dated December 15, 2010, for \$302.25 and requested he wait until December 15 before cashing it. Mr. Bishop waited and presented the cheque for payment on December 15 only to find payment had been stopped.
6. Collection proceedings by a bailiff against certain assets of Mr. Daniel were taken on or about October 10, 2011.

ISSUE

7. When and under what circumstances should the Tribunal extend the appeal periods set out in section 112 of the *Act*.

ARGUMENTS

8. Mr. Daniel argues that he was never served with a Determination; and submits he was not given the opportunity to reply to the complaint of Mr. Bishop. His appeal materials contain a number of references in support of that position.
9. The Tribunal has reviewed the appeal materials from all parties but confirms that at this stage its role is not to make substantive findings as to the merits of the appeal.

THE FACTS AND ANALYSIS

10. Section 109(1(b) of the *Act* grants the authority to the Tribunal to extend the time period for requesting an appeal even though the period has expired. No specific criteria are set out in the legislation for the Tribunal to consider as to whether to extend the statutory time to appeal.
11. The Tribunal's general discretionary authority was considered in *Niemisto and the Director of Employment Standards, BC EST # D099/96*, and the following principles were established for the guidance of the Tribunal.
 - (i) is there a reasonable and credible explanation for the failure to request an appeal within the statutory time limit?
 - (ii) has there been a genuine and on-going *bona fide* intention to appeal the Determination?
 - (iii) has the respondent party (i.e. the employer or employee), as well as the Director, been aware of the intention to appeal?
 - (iv) will the respondent party be unduly prejudiced by the granting of the extension? and
 - (v) is there a strong *prima facie* case in favour of the appellant?
12. The above principles are not intended to constitute an exhaustive list. In any particular appeal certain other, perhaps unique, factors might be considered.
13. Mr. Daniel has been aware of Mr. Bishop's complaint from shortly after it was filed. He should not have been surprised about the complaint as he had previously stopped payment on the paycheque. During the complaint process he was contacted by the Director's agents by telephone. They were following up with him regarding initial materials forwarded to him by mail to which no response had been made. Rather than obtaining the materials himself Mr. Daniel thought he would wait until they were sent again. He took no positive action to deal with the complaint until he filed his appeal application.
14. The Director has filed documents indicating among other things that a previous registered letter with a preliminary Determination from the Director was signed for by "A. Daniels." Mr. Daniel disputes receiving the letter because the signature on the card was signed "A. Daniels" and his name has no "s" at the end. The earlier employment standards forms, records and correspondence appear to list his last name with an "s".
15. The latest application to extend the time for filing an appeal appears to have been as a result of bailiff activities approximately 5 months after the time to file an appeal expired. Mr. Daniel's submissions regarding the disappearance of registered letters or other notification cards stretch credibility. I am not satisfied Mr. Daniel has met his onus of proving to the Tribunal the principles described in items (i) or (ii), in paragraph 11.
16. Mr. Daniel's purported payment as of December 15, 2010, to Mr. Bishop for work done was clearly beyond the time authorized by the *Act*. The reason given for stopping payment on that cheque was that some work done by Mr. Bishop had to be re-done. Therefore a part of the payment to Mr. Bishop should have been withheld. Mr. Daniel's position is that Mr. Bishop was not hired on an hourly basis as a labourer; but was employed in the capacity as an "experienced sider" on a piece work basis. He submits that his piece work analysis of work should result in a difference between the Determination award and his cheque in the amount of \$12.75. He submits further that a deduction of \$75 for having to replace some of Bishop's work (60 lineal feet at \$1.25 per foot) is necessary.

17. Mr. Daniel wants to extend the time for filing an appeal to argue about whether Mr. Bishop should be entitled to \$87.75 of the over \$300 owed according the Determination. He does not dispute the penalty for late payment of wages.
18. In my opinion the dollar amount that would be subject to the appeal is so small that it in itself is a unique circumstance where the Tribunal should not exercise its discretion under section 109(1)(b) and extend the time. The actual dollar figure may not be as significant if there was a very important legal point associated with the amount. But in this case there does not appear to be any such argument being made by the proposed appellant.
19. Item (v) in paragraph 11 refers to the question of whether Mr. Daniel has a strong *prima facie* case. In all the circumstances of this case Mr. Daniel does not appear to have a strong *prima facie* case in his favour.

ORDER

20. Pursuant to section 109(1)(b) of the *Act*, I Order that Mr. Daniel's request to extend the time period for requesting an appeal be denied.

Robert C.P Walker
Member
Employment Standards Tribunal