

An appeal

- by -

Hamidreza Hagh dust and Kozehkanani Hassan carrying on business as Eaton's
Enterprise
(the "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: Yuki Matsuno

FILE No.: 2009A/149

DATE OF DECISION: January 21, 2010

DECISION

SUBMISSIONS

Hamidreza Hagh dust

on behalf of the Employer

Sukh Kaila

on behalf of the Director of Employment Standards

OVERVIEW

1. Hamidreza Hagh dust and Kozehkanani Hassan carrying on business as Eaton's Enterprise (the "Employer"), appeals a Determination of the Director of Employment Standards (the "Director") issued September 11, 2009 (the "Determination"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*").
2. In the Determination, a delegate of the Director (the "Delegate") found that the Employer owed a former employee, Elaine Huston Kaglik (the "Employee"), a total amount of \$856.81 in wages under section 18 of the *Act* and accrued interest under section 88 of the *Act*. The Delegate also imposed two administrative penalties in the amount of \$500.00 each for contravention of section 18 of the *Act* and section 46 of the *Employment Standards Regulation* (the "*Regulation*").
3. Mr. Hagh dust now appeals the Determination on behalf of the Employer. The Employer's appeal form does not indicate the grounds for appeal.
4. The Employer's appeal was filed late. The task before me is to decide whether the Tribunal should exercise its discretion to extend the appeal period. I am able to make this decision based on the written materials before me: the Employer's appeal submission, the Director's submission, and the Determination.

ISSUE

5. Should the Tribunal exercise its discretion under section 109(1)(b) to extend the appeal period in this case?

ARGUMENT AND ANALYSIS

6. In deciding whether to exercise my discretion to extend the appeal period under section 109(1)(b), I must be satisfied of the following (from *Niemesto*, BC EST # D099/96):
 - 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 on-going *bona fide* intention to appeal the Determination;
 - iii) the respondent party (*i.e.*, the employer or employee), as well as the Director, must have been made aware of this intention;
 - iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
 - v) there is a strong *prima facie* case in favour of the appellant.

These factors are not exhaustive.

7. The Tribunal will not grant extensions 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: *Moën & Sagb Contracting Ltd.*, BC EST # D298/96.
8. The Determination indicates that should the Employer wish to appeal, the appeal must be delivered to the Tribunal by October 19, 2009. The Employer's appeal submission was filed on November 13, 2009, and indicates the reason for the late appeal was that the Employer never received the Determination because it was sent to the wrong address. Mr. Hagh dust also says that he did not respond to telephone calls [presumably from the Delegate] because he "needed written notice or mail" so a mediation with the Employee could be arranged.
9. The Director is of the view that the appeal period should not be extended for the following reasons: 1) the Employer's claim that the Determination was sent to the wrong address is not substantiated; 2) the Employer indicates it was aware of the investigation and consciously chose not to respond to repeated contact attempts by the Branch; 3) the Employer does not deny outstanding wages and does not provide any contradictory information, or any information that wages have been paid to the Employee; 4) the Employer conceded wages remained outstanding to the Employee in the Determination, and extending the appeal date would create unnecessary delay in processing the Determination; 5) the Employer has not provided any information suggesting it would have a strong case that might succeed should the extension be granted.
10. Considering the submissions of the parties in light of the *Niemesto* factors, my view is that the Employer has not met the burden of showing that the time period for an appeal should be extended.
11. Mr. Hagh dust says he did not receive the Determination because "they sen[t] all the mails" to the wrong address. However, this reason alone, without any further explanation, does not account for the nearly 4-week delay between the appeal deadline date and the date on which the Employer submitted his appeal. Further, it is clear from the Employer's submissions and the Determination that more than one piece of mail was sent to the address that the Delegate had on file as the Employer's last known address, yet there is no explanation by Mr. Hagh dust of what, if any attempts he made to ensure that the Delegate or more generally, the Employment Standards Branch, had the correct address. Mr. Hagh dust acknowledges in his submissions that he had received phone calls regarding the Employee's complaint, so clearly Mr. Hagh dust had opportunities to inform the Delegate of the Employer's correct address. There is, however, no indication he ever availed himself of those opportunities, and there is no indication that he took any other steps to ensure that the appeal was filed on time.
12. There is no indication in the materials that the Employer had a genuine and ongoing *bona fide* intention to appeal the Determination or that either the Employee or the Director was aware of such an intention. To the contrary, the Delegate indicates in the Determination that during a conversation with Mr. Hagh dust on June 19, 2009, he confirmed that he owed the Employee the wages claimed. I agree with the Delegate that granting an extension would create unnecessary delay in processing the Determination. The resulting delay in ensuring the Employee receives the wages owed to her would, in my view, result in undue prejudice to the Employee.
13. Lastly, my review of the materials does not disclose a strong *prima facie* case for the Employer. First, the Employer does not indicate on the appeal form the grounds of appeal on which it relies. Second, Mr. Hagh dust refers to the merits of his case in his submissions when he suggests that the Employee was not an employee but an independent contractor. Information regarding the merits of the case is properly put forward to the Delegate before the Determination is made, and the materials indicate the Delegate made several attempts to contact the Employer during the investigation to collect that information. However,

besides the phone conversation on June 19, 2009, mentioned above, the Employer did not respond to the Delegate's inquiries. In my view, it is clear from the materials that the Employer by its conduct indicated a lack of interest in responding to the Employee's complaint during the investigation phase; only when faced with an order to pay in the Determination does it appear that the Employer decided to take an interest. A successful case at the appeal stage relies not on the merits of the case but on whether the appellant can make a case on one of the grounds of appeal set out in section 112 of the *Act*. In this case, the Employer's materials contain no indication of potential success on appeal, much less a strong *prima facie* case.

14. The Employer has provided no compelling reasons for extension and there is no strong *prima facie* case. I decline to exercise my discretion to extend the appeal period.

ORDER

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

Yuki Matsuno
Member
Employment Standards Tribunal