

An appeal

- by -

Elite Rope Access and Ground Wurx Inc.

- 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 Seigel

FILE No.: 2008A/144

DATE OF DECISION: January 30, 2009

DECISION

SUBMISSIONS

Alan Gilbertson	for the Employer
Michael Hanson	on his own behalf
Sukh Kaila	on behalf of the Director

OVERVIEW

1. The Employer, Elite Rope Access and Ground Wurx Inc. (the “Employer”), 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. A delegate of the Director found in the Determination that the Employer had contravened sections 17 and 18 (wages) of the *Act*, and 46 of the *Employment Standards Regulation* (the “Regulation”) with respect to Michael Hanson. The Director also found that accrued interest under section 88 of the *Act* was owing to the employee, and that the total wages payable to the employee was \$1293.61.
3. The Director also imposed three administrative penalties of \$500.00 each on the Employer for breaching three sections of the *Act and Regulation*. The total amount administrative penalty amount was \$1500.00. The total amount payable by the Employer was \$2793.61 inclusive of the administrative penalties.
4. The Employer operates a window washing and general cleaning business. The Director found that Mr. Hansen worked as an employee from October 4, 2007 to November 11, 2007. Mr. Hansen filed a complaint for unpaid wages with the Employment Standards Branch.
5. The Delegate held a hearing into the complaint. Alan Gilbertson appeared or presented submissions on behalf of the Employer and Mr. Hansen appeared for himself. The Delegate subsequently issued the Determination on October 10, 2008. 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 November 17, 2008.
6. On December 3, 2008, the Employment Standards Tribunal (the “Tribunal”) received an appeal form from Mr. Gilbertson, appealing the Determination on behalf of the Employer. The appeal stated that evidence has become available that was not available at the time the Determination was being made and sought that the Determination be cancelled. Attached to the appeal was a letter from Mr. Gilbertson regarding the late appeal and a letter from Will George (with attachment) purporting to be new evidence.
7. By letter dated October 3, 2008, the Tribunal invited Mr. Hanson, and the Director to respond to the Employer’s late appeal. Mr. Hanson and the Director (represented by the Delegate) each forwarded 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. On December 8, 2008 the Tribunal published a decision on file #2008A/112. The decision was on the applicability of a late appeal by Alan Gilbertson on behalf of the same Employer with respect to a similar matter of non-payment of employee wages and other payments. Although I have considered this appeal independently and on its own merits, I wish to note that the necessity of appealing in a timely fashion was doubly brought to the attention of the Employer by the notification on the determination in that matter.
10. The test was put forth in that decision 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. These factors are not exhaustive.

11. 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: *Moen & Sagh Contracting Ltd.*, BC EST #D298/96.
12. The Determination indicates the deadline for appeal is November 17, 2008. The Employer's appeal was filed on December 3, 2008, sixteen days later. By way of explanation, Mr. Gilbertson says only:

...the information that I need and requested from Will George was not sent in before Nov 17, 2008 I had asked for Will to send the information in for me, but this was not done, I would like to think that I would be allowed a due process in this matter...

13. The remainder of the argument presented by Mr. Gilbertson in his appeal and attached correspondence is simply a re-telling of the story used to support his position in the Determination.
14. The undated letter from Mr. George consists of three paragraphs of description of Mr. Hanson's work situation and an attachment described as "copy from my personal records" that apparently shows a period of work hours for Mr. George and Mr. Hanson.
15. Both the respondent Hanson and the Delegate oppose the granting of time to extend the appeal period.
16. I note that the Determination refers to Mr. George with reference to arguments put forth by Mr. Gilbertson. I therefore conclude that Mr. Gilbertson knew the evidentiary value of Mr. George prior to the Determination being made. Mr. Gilbertson offers no reason why the allegedly new evidence provided by Mr. George was not available either at the Determination or within the appeal period.
17. I find under the circumstances, that Mr. Gilbertson has not provided a reasonable and credible explanation for the failure to request an appeal within the statutory time limit, and frankly, the content of the submissions is far from indicative of a *prima facie* case in favour of the appellant. Rather, I find it a re-telling of the primary facts on which the Determination was made.
18. The Employer 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

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

Sheldon Seigel
Member
Employment Standards Tribunal