

An appeal

- by -

Amrik S. Nijjar
("Mr. Nijjar")

- 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: Carol-Ann Hart

FILE No.: 2009A/159

DATE OF DECISION: February 18, 2010

DECISION

SUBMISSIONS

Ken Neville

Counsel for Amrik S. Nijjar

Ravi Sandhu

on behalf of the Director of Employment Standards

OVERVIEW

1. An appeal was filed by Amrik S. Nijjar (“Mr. Nijjar”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued on July 24, 2009, (“the Determination”) by a delegate of the Director of Employment Standards (the “Director”).
2. In the Determination, the delegate of the Director ordered pursuant to section 79 of the *Act* that Mr. Nijjar pay an administrative penalty of \$500.00 with respect to the contravention of section 46 of the *Employment Standards Regulation*, B.C. Reg. 369/95, as amended (the “*Regulation*”).
3. The appeal is brought on the grounds that the Director erred in law and failed to observe the principles of natural justice in making the Determination.
4. The time limit for filing the appeal expired on August 19, 2009. The Tribunal received an appeal from Mr. Nijjar on November 16, 2009, which included reasons for the late filing of the appeal.
5. The delegate of the Director filed a submission dated December 17, 2009, on the question of whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* to extend the time period for requesting an appeal. The appellant filed a further submission in reply on January 6, 2010.
6. The Tribunal has decided that an oral hearing is not required and that this matter can be properly addressed through written submissions.

ISSUE

7. The issue to be decided at this time is whether the time limit for requesting an appeal should be extended.

FACTS

8. The Agricultural Compliance Team of the Employment Standards Branch (the “Team”) attended at the appellant’s blueberry field to conduct a site visit on July 17, 2009. After the request of the Team for access to the blueberry field was denied by Mr. Nijjar, the delegate of the Director found that he had contravened section 46 of the *Regulation* by attempting to restrict the Director from making an entry under section 85(1) of the *Act*.

SUBMISSIONS

Appellant's Submissions

9. Mr. Neville acknowledged that the period for filing the appeal of the Determination had passed. He submitted that the appeal should nonetheless proceed. According to Mr. Neville, "*Mr. Nijjar intended to appeal the penalty but due to the extreme time commitment to his farm he put it aside and did not get the opportunity to initiate it in a timely manner*". Mr. Neville maintained that in fairness to Mr. Nijjar, the time for filing an appeal should be extended.
10. The arguments provided by Mr. Neville with respect to the merits of the appeal are set out below under the heading *E. Merits of the appeal- strong prima facie case*.

Director's Submissions

11. The delegate of the Director made the following submissions based on the factors which are reviewed by the Tribunal in determining whether to extend the time frame for filing an appeal.
 1. There was no good reason why the appellant could not meet the deadline for filing an appeal. The Delegate wrote that while the Director agreed that farming is time-consuming; the farm in question was a blueberry farm, and the harvest was over by September.
 2. The appeal was filed more than 3 months after the deadline, and this constituted an unreasonably long delay.
 3. The appellant did not do or say anything to give the impression that he had always intended to appeal the Determination.
 4. If the period for filing the appeal were extended, the respondent's case would not be harmed, as the appellant's case was not strong enough that it would succeed if the Tribunal granted an extension.
12. The delegate for the Director further submitted that the appeal should be denied because a disincentive was necessary to promote compliance with the *Act* and to prevent a repeat contravention.
13. In his reply, Mr. Neville contended that Mr. Nijjar had reasonable grounds for the late filing of his appeal. He further submitted that even if the Tribunal concluded that Mr. Nijjar did not have reasonable grounds, the appeal should be allowed in the interest of justice. Mr. Neville added:

Justice must prevail and actions contravening the Employment Standards Act by both employers and Employment Standards field auditors must not be condoned due to minor technicalities, in this case, late filing the appeal.

14. Mr. Neville wrote that the Director's position that a disincentive was needed was not valid in this case because Mr. Nijjar had subsequently complied with the *Act*, and would continue to do so in the future.

ANALYSIS

15. In deciding whether to extend the period in which to file an appeal in this case, I note that the purpose of the *Employment Standards Act*, as set out in section 2(d), is "*to provide fair and efficient procedures for resolving disputes*". The *Act* provides a time frame in which to appeal in order to ensure that appeals are dealt with efficiently.

Under section 109(1)(b) of the *Act*, in a situation in which the appeal period has expired, the Tribunal may extend the time frame for the filing of an appeal.

16. The Tribunal reviews the following non-exhaustive list of principles concerning when, and under what circumstances, appeal periods should be extended under section 109(1)(b) of the *Act*. (See *Niemisto*, BC EST # D099/96, *Re Nature's Choice Foods*, BC EST # D206/04, and *Bravo Cucina Ristorante Italiano Ltd.*, BC EST # D343/00).
- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - ii) there was not an unreasonably long delay in filing the appeal;
 - iii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - iv) 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.
17. The onus is on the appellant to show that there are compelling reasons for which the time period for an appeal should be extended: *Moen & Sagb Contracting Ltd.*, BC EST # D298/96 and *Re Roseg Management Corp.*, BC EST # D127/04.

A. Reasonable and Credible Explanation for Delay

18. The Determination provides the appellant with information regarding the right to appeal. The Determination indicates that the appeal was to be delivered to the Tribunal by August 19, 2009. The appeal was filed on November 16, 2009.
19. Based on the information provided in the submissions, I cannot conclude that there is a reasonable explanation for the delay. The appellant did not account for the period of almost 3 months which passed after the date for appealing the Determination before the appeal was filed. There is no explanation as to why Mr. Nijjar was unable to take other steps to ensure that the appeal was filed on time.
20. In the circumstances of this case, a delay of nearly 3 months after the deadline had passed constituted an unreasonably long delay.

B. Bona Fide Intention to Appeal

21. Despite the fact that Mr. Nijjar had received the Determination and was made aware of the time frame in which to file an appeal, no bona fide intention to appeal the Determination was demonstrated.

C. Parties Made Aware of Intention to Appeal

22. There was no evidence to show that Nijjar had advised the Director that he intended to file an appeal.

D. Respondent Prejudice

23. There is no significant prejudice to the Director in this case.

E. Merits of the Appeal – Strong prima facie case

24. In the written submission accompanying the Appeal Form, the appellant contended that the delegate of the Director had contravened sections 85(1) and 85(2) of the *Act*.
25. Mr. Neville referred to each of his four enumerated concerns regarding the Determination as a “Contravention”. None of these four arguments is relevant to the question of whether the Director failed to observe the principles of natural justice in making the Determination. The appellant has not explained the basis for the allegation that the Director breached the principles of natural justice. Mr. Nijjar was informed of the right of the Director to conduct the investigation, and the reasons for the investigation. The appellant was also advised of the consequences of failing to comply with the request to enter.
26. There is no indication that Mr. Nijjar was deprived of the basic rights to know the case against him, to have an opportunity to respond, to have the matter decided by an unbiased decision maker, or to be given reasons for the decision. The appellant has failed to substantiate his allegation that the Director breached the rules of natural justice.
27. I will address each of the four issues raised by the appellant in turn to decide whether there is a strong *prima facie* case based on the argument that the Director erred in law.
28. 1. The delegate of the Director indicated in the Determination that the Team had arrived for the visit at 7:22 a.m.. Mr. Neville maintained in his submission that this was before normal working hours of 8:00 a.m. to 5:00 p.m. He indicated that workers could begin work as early as 7:30 a.m., but most started at the regular starting time of 8:00 a.m.
29. Section 85 of the *Act* provides as follows:

Entry and inspection powers

- 85 (1) For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following:
- (a) enter during regular working hours any place, including any means of conveyance or transport, where
 - (i) work is or has been done or started by employees,
 - (ii) an employer carries on business or stores assets relating to that business,
 - (iii) a record required for the purposes of this Act is kept, or
 - (iv) anything to which this Act applies is taking place or has taken place;
 - (b) inspect, and question a person about, any work, material, appliance, machinery, equipment or other thing in the place;
 - (c) inspect any records that may be relevant to an investigation under this Part;
 - (d) on giving a receipt for a record examined under paragraph (c), remove the record to make copies or extracts;
 - (e) require a person to disclose, either orally or in writing, a matter required under this Act and require that the disclosure be under oath or affirmation;
 - (f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).
- (2) Despite subsection (1), the director may enter a place occupied as a private residence only with the consent of the occupant or under the authority of a warrant issued under section 120.

30. Section 85 of the *Act* provides that the right of entry can be exercised whether the Director or delegate has received a complaint, or whether the Director has initiated an investigation without a complaint.
31. Section 46(2) of the *Regulation* provides as follows:
- 46 (2) No person may restrict or attempt to restrict the director from making a entry under section 85(1)(a) of the Act.
32. The delegate of the Director wrote in the Determination that on July 17, 2009, at 7:22 a.m., the Team had conducted a site visit at the blueberry farm in question, where it had observed employees hand harvesting blueberries on the property. The appellant did not deny that there were people working at the time, and there was no evidence to show what the regular working hours were during the harvest time. There was also no indication that the appellant had advised the Team that they were asking to conduct the site visit outside of regular working hours. I further note that the appellant's submission indicates that this was a particularly busy period as the blueberries had all matured at the same time, and there was a short time frame for picking the crop. Based on the submissions presented, I do not find that there is a strong *prima facie* case in favour of the appellant on the basis that the attempted entry was outside of regular working hours.
33. 2. The delegate of the Director noted in the Determination that he had requested permission from the owner to enter the blueberry field. It was Mr. Neville's submission that section 85(2) of the *Act* allowed Mr. Nijjar to refuse entry to his private residence unless the Team had authority under a warrant. He maintained that if the Team members had the right to enter the property under section 85(1), they would not have asked for the consent of the owner.
34. As set out below under the fourth issue raised by the appellant, the Team did not require a warrant to conduct a site visit of the blueberry farm.
35. It appears that the Team requested the consent of the owner before entering the property as a matter of courtesy. In the Determination, the delegate of the Director wrote that he had advised the owner of the purpose and objectives of the site visit. Further, when Mr. Nijjar refused to give permission to enter, he has given information about the authority of the Director under section 85 of the *Act*, and the administrative penalty which would result from attempting to restrict the Team from entering.
36. 3. Mr. Neville wrote that Mr. Nijjar did not state that: "they *would not allow any site visit on their farm*". He had requested that the Team return at a later time that day. The Team had asked Mr. Nijjar to provide an answer as to whether they could enter immediately, and he had replied that they could not. Mr. Neville then set out the reasons for which Mr. Nijjar had requested entry later in the day. He noted that these reasons had not been stated to the Team.
37. There is nothing in this argument of the appellant which would indicate that there is a strong *prima facie* case based on a possible error of law, or a denial of natural justice by the delegate of the Director.
38. 4. In the Determination, the delegate of the Director had cited the decision of the Tribunal in *Charan Rai and Manjinder Rai, operating as Surrey Farms Produce*, BC EST # D493/01 in support of his finding that the appellant had contravened section 46(2) of the *Regulation*. The appellant submitted that because Mr. Nijjar's farm was his "*principal residence*", his situation was different from that which was at issue in the decision of the Tribunal cited in the Determination. Mr. Neville maintained in his submission that "*the private residence definition includes a home and all surrounding land including land farmed*", and as a result, the appellant was acting within his rights under section 85(2) of the *Act*.

39. Section 85(2) of the *Act* provides as follows:

Despite subsection (1), the director may enter a place occupied as a private residence only with the consent of the occupant or under the authority of a warrant issued under section 120. (underlining mine)

40. The term “private residence” is not defined in the *Act*.

41. In *Townline Growers (1994) Ltd.*, BC EST # D017/03, the Tribunal noted that section 85 of the *Act* provides for broad entry and inspection powers for the Director, and the right to enter is not contingent on the receipt of a complaint. Rather, the purpose of the right of entry is to ensure compliance with the *Act*. At page 6 of the decision, the Tribunal wrote in part as follows:

...the right to enter a place where work is performed does not rest on any reasons given to the farmer. This is distinct from the entry of a dwelling house under section 85(2) which requires entry with a warrant issued under section 120 of the *Act*.

42. The provisions concerning a search warrant to enter a private residence are contained in section 120 of the *Act*, which reads as follows:

If satisfied by evidence given under oath or affirmation that there is reason to believe there are in a private residence records or other things that are relevant for the purposes of an investigation or appeal under this Act, a justice may issue a warrant authorizing the person named in the warrant to enter the private residence in accordance with the warrant in order to exercise the powers referred to in section 85 (1) (b) to (d) or 109 (1) (e) or (f).

43. In *Black's Law Dictionary*, Seventh Edition, the word “residence” is defined as follows:

The place at which a person is physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere.

44. The *Black's Law Dictionary* definition makes it clear that it is a “place...that the person regards as a home”. There is no definition of the phrase “private residence” in *Black's Law Dictionary*. In my view, the word “private” which appears together with “residence” in section 85(2) of the *Act* provides further clarity that a farm, where harvesting work is being performed by employees, would not be included.

45. Based on all of the above authorities, I cannot find that the work site which the delegate of the Director requested to visit, constitutes part of the “private residence” of the appellant as alleged.

46. I conclude that the appellant has failed to demonstrate that there is a strong *prima facie* case.

SUMMARY

47. The appellant has not established that there are grounds based on which the Tribunal should exercise its discretion to extend the time limit to appeal the Determination of the delegate of the Director.

ORDER

48. The request to extend the time limit for submitting an appeal pursuant to section 109(1)(b) of the *Act* is denied. The appeal is dismissed and the Determination is confirmed.

Carol-Ann Hart
Member
Employment Standards Tribunal