

An appeal

- by -

Trevor Bereck  
("Bereck")

- 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:** David B. Stevenson

**FILE No.:** 2005A/212 and 2005A/213

**DATE OF DECISION:** February 27, 2006

## DECISION

### SUBMISSIONS

Trevor Bereck	on his own behalf
Donald McLellan	on behalf of Messenger Restoration Services Ltd. and Trisum Investments Corporation operating as Grizzly Den
Ivy Hallam	on behalf of the Director

### OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “Act”) by Trevor Bereck (“Bereck”) of two Determinations issued by a delegate of the Director of Employment Standards (the “Director”) on June 29, 2005.
2. The Determinations were made on complaints filed by Bereck against Messenger Restoration Services Ltd. and Trisum Investments Corporation operating as Grizzly Den. The complaints alleged Bereck had been employed by those companies from April 23, 2004 to August 22, 2004 and was owed regular and overtime wages, annual vacation pay, a bonus and expenses in the amount of \$64,860.00.
3. The complaint against Messenger Restoration Services Ltd. was dismissed by the Director because there was no evidence that Bereck was ever employed by that company. The complaint against Trisum Investments Corporation operating as Grizzly Den resulted in a finding that Bereck was an employee of that company for the purposes of the *Act*, but that no wages or other moneys were owed to Bereck. An administrative penalty was imposed on Trisum Investments Corporation operating as Grizzly Den for its contravention of Section 28 of the *Act*.
4. The appeal raises the following areas of disagreement with the Determinations:
  - (i) many things about the investigation do not make sense;
  - (ii) the investigating delegate told Bereck there would be an oral hearing;
  - (iii) the investigating delegate refused Bereck’s request to send in affidavits;
  - (iv) there was not a proper investigation, as the investigating delegate only called a few numbers, and things were missed;
  - (v) Bereck had spoken to “Deanna”, who told him that she had told the investigating delegate that she was a witness to his “full time extremely hard labour”; and
  - (vi) The investigating delegate made “huge mistakes” in what she asked some of the people that she did talk to.

5. Bereck says there is additional evidence that has come available.
6. Bereck has asked for an oral hearing on his complaints. He says he needs a chance to prove his case and to show the respondents are lying.

### **PRELIMINARY ISSUE**

7. A preliminary issue relating to the timeliness of the appeal has arisen. The appeal was delivered to the Tribunal on December 13, 2005 - substantially past the time limited for appeal under Section 112(3) of the *Act* - and raises the question of whether the Tribunal will exercise its authority under Section 109(1)(b) of the *Act* to extend the statutory time period for filing the appeal. On December 20, 2005, the Tribunal notified the parties that the timeliness issue would be decided before deciding the merits of the appeal.

### **THE FACTS**

8. The facts and the submissions relating to the preliminary issue require some review.
9. The following facts appear from the Record and from the material filed on this issue:
10. The Determinations under consideration in this appeal were issued on June 29, 2006 and mailed by certified mail to Bereck's last known address on that date. The address to which the Determinations were sent had been provided by Bereck to the Director on June 20, 2005. There is information in the record indicating Canada Post attempted delivery of the Determinations to the address provided and left a delivery notification card with pick-up details on July 2, 2005. The mail was returned to the Director as "unclaimed" on July 26, 2005.
11. On July 28, 2005, Bereck called and left a message with the Director, providing an address and telephone number in England. The investigating delegate called Bereck at the number provided on the same day and left a message advising him that the Determinations would be sent by registered mail to the new address provided. The delegate also explained the time limit for filing an appeal would expire shortly and if Bereck would provide a fax number or e-mail address she would send the Determinations immediately. On July 29, 2005, Bereck provided the delegate with a fax number and the Determinations were successfully transmitted on the same day to that number.
12. Both Determinations clearly note that an appeal of the Determinations must be delivered to the Tribunal by 4:30 pm on August 8, 2005.
13. The appeal form which the Tribunal requires to be completed and submitted contains a reference to Late Appeals, which says:

The Determination states a deadline to file an appeal. Late appeals are usually not accepted unless a compelling explanation for the missing deadline is provided. If you have filed late, please provide an explanation.

14. On the appeal form, Bereck has provided the following explanation:
- “I received the decision late and didn’t realize I could still appeal. As well with new evidence and witnesses I want the chance to get affidavits that I was told I couldn’t get. She told me this not court [sic].
15. In an attached submission, Bereck elaborated on the reasons for the late application, providing the following reasons:
1. Medical: powerful mind altering medication changes and increases, brain injury received at Illingby’s while working with Messenger Restoration Services Ltd. Truck. Making it extremely difficult to get things done with pain etc., Due to Illingby’s fraud scam and not getting paid etc. I have had major health issues, break down, Stress, post traumatic stress, anxiety, depression and permanent damage to my mind that the dr. has now taken me off work permanently. This has played a part in getting this appeal sent off sooner. Medical evidence can be provided if needed.
  2. Misinformed by Employment Standards: Was informed by Ivy Hallam that it was now to late to appeal the decision after the deadline. I clearly wanted to appeal the decision.
  3. Received determination at appeal deadline: I did not receive the appeal until the appeal deadline.
  4. New evidence: New evidence obtained by freedom of information from different govt. bodies has been collected, new witness contacts are available, new signed affidavits will be provided having discovered that Ivy had misinformed me stating that that this is not a court and that I couldn’t submit them.
  5. Freedom of information request: was held back and came late, extreme huge job going through each thing to find mistakes. Took a lot of time, provided new evidence.
  6. Determination came before hearing: Ivy Hallam said a hearing would happen first before a determination. Unexpected determination prior to hearing.
  7. Communication failure: My London address was either not received by Ivy Hallam on her voice mail prior to posting the determination or she made a mistake by not recording my address.
  8. Researching: I found information regarding late appeals and suddenly discovered I could appeal.
  9. Full time effort: I have been full time gathering evidence and putting together everything and anything I can to fight hard for my right to be paid.
  10. Documents found: through freedom of information I have received documents in the form of letters from individuals that all have false malicious testimony and a determination based on these letters. I should have received these and I could have built a defense proving they lied, as I will in this report.
  11. Discussion with Ivy Hallam that it was to late to appeal decision.
  12. My effort: I left my holiday with friends to get back to deal with appeals but was not able to get a flight prior to 15<sup>th</sup>, Aug, 2005 as seen in my flight document dated 6<sup>th</sup> Aug., 2005. I just took the flight anyways hoping I could do something to get my pay.
  13. Withholding evidence and documents: From March, 10<sup>th</sup>, 2005 The respondents as I have just found out had possession of a signed document dated March,10<sup>th</sup>, 2005 telling of how I did work. it is from Deanna De Dape.
  14. Pain: I have a lot of pain from two injuries while working for Messenger Restoration Services Ltd. that were sustained at 7981 Silver Star rd. and the Illingby estate on L & A rd. Back pain, neck pain and head aches etc. I have to take a very strong horse pill for killing the pain and it doesn’t take the pain away. This alone the drug and pain and a throbbing headache is making it very difficult to do this appeal.

15. In the Trisum determination on page two it states (Directors and Officers of companies can also be required to pay wages owed to employees and the total administrative amount. The amounts owing may be referred to a collection agency without further notice.) This looked to me like I was to enforce wage payment now. I did discuss it with Ivy after appeals deadline and was told I wasn't getting paid.
16. It is probably clear to even the casual reader that there are some internal inconsistencies in the above submission.
17. In a letter to the Tribunal dated January 6, 2006, and received by the Tribunal on that date, Bereck says he received the Determinations in England on August 8, 2005 and "found it was too late to appeal by the time I got home". He does not indicate whether he received the fax transmission of the Determinations.
18. On January 16, 2006, the Tribunal received a further submission from Bereck on the timeliness issue. In this submission he says:

**Please I hope you will consider my appeal as it is well before the 13-month deadline for appeal considerations.**

Please accept confirmation of a serious illness being a reason for my late appeal to the employment standards. My Dr. is sending confirmation to you in a letter by fax ASAP.

Find attached documents proving absence abroad and my attempt to get back to Canada from my very needed relaxation and rest and try and deal with employment issues. 1. a boarding pass 2. a receipt for airplane fare 3. I previously sent my itinerary.

I apologize but there is some other special circumstance that is out of my control at present. As well as having been misinformed of the ability to do a late appeal. Freedom of information requests have been applied for and are slowly coming with some apology notes for late arrival. Still waiting for some requests to come. Pain meds, post traumatic stress, depression and nervous breakdown etc. from employer fraud, abuse & damages etc.

It is my personal opinion that it is in the interest of justice that these multiple offences of the Employment Standards Act of B.C. are treated seriously to mediate my case and as well any factor in preventing this type of employer behaviour from ever happening again. If the employer actually gets away with this it will be a great injustice.

I truly believe with just a little effort of careful, simple investigation that my appeal is reasonably likely to succeed. I would point out that Deanna De Pape for instance saw me working all day every day as a crew foreman. She had whatsoever no knowledge of my wage agreement. She is a definitive witness to my management labor. I will be supplying my employee's statements and telephone contact information shortly.

19. Comments on two matters would seem appropriate at this time. First, the Tribunal did receive a letter from Dr. Granger R. Avery of the Port McNeill Medical Clinic on January 18<sup>th</sup>, 2006. This document has been considered, but because of the confidence under which it was provided to the Tribunal, its contents will not be transcribed in this decision. The letter does not confirm Bereck's assertions about his "medical condition" and, while confirming that Bereck has a medical condition, provides no explanation how that condition could cause the delay present in this case.
20. Second, while it is alluded to several times in Bereck's submissions to the Tribunal, there is no record that Deanna DePape told the Director that she was a witness to Bereck's full time employment with either, or both, of the respondents. One of the Determinations refers to a discussion between the investigating delegate and "Deana", who is described as having worked part time cleaning rooms at the Grizzly Den for

about two months in the spring of 2004, where Deana tells the investigating delegate, “as far as she knew, Mr. Bereck worked at Grizzly for his room and board”. As well, despite Bereck’s promise to provide the Tribunal with “Deanna De Pape’s statement to my working and being a crew foreman supervising Dustin and crew etc.”, to date no such statement has been delivered to the Tribunal.

21. Bereck says he returned to Vancouver on August 15, 2005 and has provided a boarding pass and airfare receipt to confirm that assertion. The appeal was not filed with the Tribunal until December 13, 2005.

## ARGUMENT AND ANALYSIS

22. Subsection 112(2) requires, among other things, that an appeal of a Determination to the Tribunal be filed within the appeal period. The appeal period is described in paragraphs 112(3), which says:

*112 (3) The appeal period referred to in subsection (2) is*

*(a) 30 days after the date of service of the determination, if the person was served by registered mail, and*

*(b) 21 days after the date of service of the determination, if the person was personally served or served under section 122(3).*

23. Subsection 122(3) allows electronic or fax service at the request of a person.

24. The *Act* imposes an appeal deadline to ensure that appeals are dealt with promptly. This is consistent with one of the purposes of the *Act*, which is to provide fair and efficient procedures for resolving disputes. The Tribunal will not exercise its discretion to extend the time for filing an appeal unless there are compelling reasons for doing so: see *Moen and Sagh Contracting Ltd.*, BC EST #D298/96). The burden is on the appellant to show that the appeal period should be extended: see *Niemisto*, BCEST #D099/96 and *Matty Tang*, BCEST #D211/96.

25. The Tribunal has established a non-exhaustive list of criteria for the exercise of discretion extending the time to file an appeal. The party seeking an extension must satisfy the tribunal that:

- (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- (2) there is not an unreasonably long delay in filing the appeal;
- (3) there has been a genuine, ongoing bona fide intention to appeal the determination;
- (4) the respondent and the director has been made aware of this intention;
- (5) the respondent will not be unduly prejudiced by the granting of an extension; and
- (6) the appellant has a strong prima facie case that might succeed.

26. Except to the extent necessary to determine if there is a “strong prima facie case that might succeed”, the Tribunal does not consider the merits of the appeal when deciding whether to extend the appeal period.

27. I have decided this is not a case where the Tribunal should exercise its discretion to extend the statutory time limit for appealing the Determinations. My decision is grounded in several considerations, including the unreasonably lengthy delay in filing, the absence of any indication of an ongoing and bona fide intention to appeal, the absence of any indication to the Director or the respondent that he intended to appeal and the absence of a strong *prima facie* case that might succeed on appeal.

28. Even accepting that Bereck's explanation for failing to request the appeal within the statutory time limit is reasonable, there is no adequate explanation for the lengthy delay, of more than four months from the expiry of the statutory time period, in filing the appeal. Bereck's own submissions to the Tribunal acknowledge he was aware of the time limit for filing the appeal. Bereck gave no indication to the Director or the respondent during this period that he intended to appeal the Determinations. He says, at one point in his submissions that he "suddenly discovered" he could appeal while researching late appeals. He does not say when this "discovery" was made, but there are problems for Bereck in this explanation either way. If he did not "discover" he could appeal until December, the logical inference is that he no intention of appealing before that discovery and appealing the Determinations was not perceived as being sufficiently important to make inquiries or research earlier. Alternatively, if he "discovered" this information soon after the expiry of the statutory appeal period, his subsequent delay in filing the appeal is unexplained, unreasonable and unacceptable.
29. The letter from Dr. Avery does not provide an adequate explanation for the lengthy delay. The letter does not appear to appreciate that the delay exceeded four months or provide any assistance in explaining - if there is any explanation - how his medical condition could result in a delay of that length.
30. Bereck's case on appeal is not strong. Notwithstanding his many assertions in the appeal and related submissions of additional evidence and affidavits, nothing of consequence has been added to the material in the Record. Fundamentally, the appeal does no more than challenge the investigation done, and the findings and conclusions of fact made, by the delegate. None of the grounds of appeal chosen by Bereck or the reasons supporting those grounds of appeal withstand scrutiny. There is no indication in the material or on the face of the documents that Bereck was told there would be an oral hearing, that the investigating delegate refused Bereck's request to send in affidavits or that the delegate made "huge mistakes" in investigating the Bereck's complaints. Not is there any reason to conclude the respondents and every person supporting their position in response to Bereck's complaints is lying or involved in a fraud against Bereck and the Director.
31. The "new" evidence that Bereck seeks to rely on is unlikely to satisfy the conditions on which the Tribunal would accept such evidence.
32. For the above reasons, I decline to exercise my discretion under Section 109 of the *Act* and as a result the appeals are dismissed.

## **ORDER**

33. Pursuant to Section 115 of the *Act*, I order the Determinations dated June 29, 2005 be confirmed.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**