

An appeal

- by -

Dashmesh Trucking Ltd.
("Dashmesh")

– 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)

and

An application for suspension

- by -

Dashmesh Trucking Ltd.
("Dashmesh")

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

Pursuant to section 113 of the
Employment Standards Act R.S.B.C. 1996, C. 113 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2010A/25 & 2010A/26

DATE OF DECISION: April 7, 2010

DECISION

SUBMISSIONS

Greg Brown

on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Dashmesh Trucking Ltd., (“Dashmesh”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued October 21, 2009.
2. Garry Ferguson worked for Dashmesh as a truck driver from July 27, 2009, until August 28, 2009. Mr. Ferguson filed a complaint alleging that Dashmesh had contravened the *Act* by failing to pay him regular wages and for deducting the cost of a new pump for the company truck from his wages.
3. Following an investigation into Mr. Ferguson’s complaint, the Director’s delegate determined that Dashmesh had contravened Sections 17, 18 and 21 of the *Act* in failing to pay Mr. Ferguson regular wages and for requiring Mr. Ferguson to pay some of the employer’s business costs. The delegate determined that Mr. Ferguson was entitled to \$1,946.14. The delegate also imposed a \$1,500 penalty on Dashmesh for the three contraventions of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulation*.
4. Dashmesh contends that the delegate erred in law in finding that Mr. Ferguson was entitled to wages and in concluding that it had made unauthorized deductions from his wages. Dashmesh contends that it was never notified of the complaint or the investigation. It says that Mr. Ferguson was a sub contractor and that he was paid all wages to which he was entitled. It further submits that Mr. Ferguson agreed to pay for the pump. Dashmesh seeks to have the Determination cancelled.
5. Dashmesh filed an appeal of the Determination on February 15, 2010. Pursuant to section 112 of the *Act*, Dashmesh’s appeal was to have been filed within 30 days of the date of service (if served by registered mail) or within 21 days of being personally served. Dashmesh’s appeal period expired November 30, 2009. On or about February 23, 2010, West Coast Court Bailiffs Inc. secured the sum of \$6,352.20 from Dashmesh. On February 15, 2010, Dashmesh sought an extension of time in which to file the appeal and a suspension of the Determination. The Director agreed to place the seized funds in trust until the appeal is decided.
6. These reasons address only the timeliness of Dashmesh’s appeal and are based on the written submissions of the parties.

ISSUES

7. 1. Whether the Tribunal should exercise its discretion under section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

FACTS AND ARGUMENT

8. Mr. Ferguson filed his complaint on September 8, 2009, after having sent the employer a Self Help kit and receiving no response. On September 16, 2009, the delegate advised the employer of the complaint by registered mail. The letter was sent to the old and new home addresses of the employer, which was also the

registered and records office. The letters were also sent by regular mail. The registered mail was returned marked “Moved unknown”; the letters sent by regular mail were not.

9. The delegate concluded that the employer had notice of the case against it and failed to respond. He determined, based on the uncontradicted evidence of the employee, that Mr. Ferguson had not been paid for work he performed during the period August 20 to 28, 2009, and that the employer had deducted \$425.00 from his pay for the replacement of a pump in the company truck. The delegate further concluded that Mr. Ferguson was entitled to vacation pay on the unpaid wages.
10. Dashmesh contends that it had no knowledge of the allegations against it because the delegate sent the documents to an incorrect address. It also alleges that Mr. Ferguson was a sub contractor operating under the name Trucks R us LTD, rather than an employee, and that he had been paid for all work performed. Dashmesh provided a copy of two cheques issued June 25, 2009, and August 13, 2009, in support of its position. Finally, Dashmesh says that Mr. Ferguson agreed to pay for the broken pump and this amount was therefore deducted from the amounts paid to him.
11. The Director contends that Dashmesh has not provided any reasons why the appeal could not have been filed before the deadline. Although Dashmesh asserts that the Branch had an incorrect address, the Director says the Branch sent the documents to the employer’s new address. The Director submits that Dashmesh’s appeal is an attempt to re-argue the appeal on the merits.
12. Mr. Ferguson stated that he was unable to make a written submission because of health issues, but verbally advised the Tribunal’s manager of appeals that he opposed Dashmesh’s application for an extension of time and suspension of the Determination.

ANALYSIS

13. Section 112 of the *Act* provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 30 days of service, if served by registered mail, or 21 days after service, if served personally.
14. These time limits are in keeping with section 2(d) of the *Act* which provides that the legislation is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
15. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
16. In *Niemisto* (BC EST # D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those include that 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 has been a genuine, ongoing *bona fide* intention to appeal the determination;
 - (3) the respondent party as well as the director has been made aware of this intention;
 - (4) the respondent party will not be unduly prejudiced by the granting of an extension; and
 - (5) there is a strong *prima facie* case in favour of the appellant.
17. These criteria are not exhaustive.

18. I am not persuaded that there is a reasonable and credible explanation for failure to request an appeal within the statutory time limit.
19. The record indicates that the Determination was sent by registered mail to Dashmesh and to Rupinder K. Grewal at the address indicated on the appeal form. The mail sent to Rupinder K. Grewal was successfully delivered on October 26, 2009. I find that Dashmesh had knowledge of the complaint and the opportunity to respond. It did not do so. Further, despite being served with the Determination, Dashmesh took no steps to appeal it until the Branch took steps to enforce it.
20. I am not persuaded that Dashmesh had a genuine, ongoing intention to file an appeal of the Determination.
21. I understand from the Tribunal correspondence that Mr. Ferguson is ill and therefore, I find that he would suffer some prejudice if an extension were granted.
22. Finally, I am unable to find that there is a strong *prima facie* case in Dashmesh's favour. Although Dashmesh submitted new evidence on appeal, this evidence does not meet the Tribunal's test for new evidence.
23. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
 - a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - b) the evidence must be relevant to a material issue arising from the complaint;
 - c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - d) the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
24. The Tribunal has a well established principle that it will not consider new evidence that could have been provided at the investigation or hearing stage (see *Tri-West Tractor Ltd.*, BC EST # D268/96 and *Kaiser Stables Ltd.*, BC EST # D058/97). As the information provided by Dashmesh was available during the investigation, it ought to have been provided to the delegate. The employer cannot now rely on this evidence as a basis for its appeal.
25. Finally, having reviewed the record and the Determination, I find that the delegate's conclusions were supportable on the evidence before him and would thus find no *prima facie* case in support of any of the grounds of appeal. Although Dashmesh provided copies of two cancelled cheques in support of its position that Mr. Ferguson had been paid, neither cheque represented payment for the period of time claimed by Mr. Ferguson, that being August 20 to 28, 2009.
26. I deny Dashmesh's application.

ORDER

27. Pursuant to section 109(1)(a) of the *Act*, I deny Dashmesh's application to extend the time for filing an appeal. Accordingly, I also deny Dashmesh's application to suspend the Determination.

Carol L. Roberts
Member
Employment Standards Tribunal